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In the Supreme Court of the United States

OCTOBER TERM, 1934

ATLANTIC COAST LINE RAILROAD COMPANY, *Appellant*,
VERSUS
STATE OF FLORIDA, ETC., ET AL, *Appellees*,
No. 344

STATE OF FLORIDA, ETC., ET AL, *Cross-Appellants*,
VERSUS
ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., *Cross-Appellees*.
No. 345

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF ON BEHALF OF ATLANTIC COAST LINE RAILROAD COMPANY

ALFRED P. THOM,
CARL H. DAVIS,
W. E. KAY,
ROBERT C. ALSTON,
WM. HART SIBLEY,
Attorneys for Atlantic Coast Line Railroad Company.

January 7, 1935.

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ATLANTIC COAST LINE RAILROAD COMPANY, *Appellant,* VERSUS STATE OF FLORIDA, ETC., ET AL, *Appellees,*	No. 344
STATE OF FLORIDA, ETC., ET AL, *Cross-Appellants,* VERSUS ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., *Cross-Appellees.*	No. 345

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF ON BEHALF OF ATLANTIC COAST LINE RAILROAD COMPANY

I.

REFERENCE TO OFFICIAL REPORTS AND OPINIONS IN THIS CAUSE

1. *Georgia Public Service Commission v. Atlantic Coast Line Railroad Company*, 146 I.C.C. 717, decided August 2, 1928 (R. Vol. I, p. 16 et seq.). First Report and Order of Interstate Commerce Commission in this cause.

2. *State of Florida v. United States, et al*, 30 Fed. (2d) 116, decided January 17, 1929. First Opinion of District Court for Northern District of Georgia in this cause.

3. *State of Florida, et al, v. United States, et al*, 31 Fed. (2d) 580, decided March 22, 1929. Second decision of District Court of United States in this cause.

4. *State of Florida, et al, v. United States, et al*, 282 U.S. 194, decided January 5, 1931. First decision of Supreme Court in this cause.

5. *Georgia Public Service Commission v. Atlantic Coast Line Railroad Company*, 186 I.C.C. 157, decided July 5, 1932. Second Report and Order of Interstate Commerce Commission in this cause—reopened proceedings.

6. *Georgia Public Service Commission v. Atlantic Coast Line Railroad Company*, 190 I.C.C. 588, decided January 9, 1933. Last report and order of Interstate Commerce Commission in this cause—second reopened proceeding.

7. *State of Florida, et al, v. United States, et al*, 4 Fed. Sup. 477, decided February 24, 1933. Opinion and decree

refusing to enjoin the last above order of Interstate Commerce Commission.

8. *State of Florida, et al, v. United States, et al,* decided January 22, 1934. (R. 349). Opinion in Restitutions case on which is based the decree appealed from.

9. *State of Florida, et al, v. United States, et al,* dated April 14, 1934 (R. 383). Decree based on opinion of January 22, 1934, and which is appealed from.

10. *State of Florida, et al, v. United States, et al,* 292 U. S. 1, decided April 2, 1934 (R. 369). This is the cause in which the decree of the District Court dated February 24, 1933, was affirmed. (See No. 7 above).

II.

STATEMENT AS TO JURISDICTION.

Upon the presentation of the petition for allowance of appeal in this case, appellant filed a typewritten statement particularly disclosing the basis upon which it was contended that this court has jurisdiction to review the decree in question. Said statement was in conformity with the requirements of paragraph 1 of Rule 12 of the Revised Rules of Practice of this Court. The said statement was duly served upon all opposing counsel; and on the 8th day of October, 1934, this Court noted probable jurisdiction in this case.

III.

STATEMENT OF THE CASE

This appeal is from a decree in equity of the United States District Court for the Northern District of Georgia (three

Judges sitting), dated April 14, 1934, and filed on April 17, 1934, in which the Atlantic Coast Line Railroad Company was ordered to restore to complainants, Brooks-Scanlon Corporation, Cummer Cypress Company, Wilson Cypress Company, Wilson Lumber Company of Florida, and to the members of the Florida Railroad Commission, for the use and benefit of the several shippers on behalf of whom the Commission had filed claims, the several amounts set out in said decree, growing out of the circumstances hereinafter mentioned. The aggregate principal of said sums is $99,941.77. The aggregate of the principal and interest of the said amounts so adjudged to be paid by the appellant to date of the decree was $133,054.56, with interest upon the principal amounts contained in said aggregate sum at the rate of six per centum per annum from the date of the decree. (R. Vol. I 383-387).

The said decree is based upon an opinion dated January 22, 1934, and filed January 26, 1934 (R. 349). The opinion is copied as Appendix No. 1 hereto. The opinion and the decree were signed by two of the three Judges; Mr. District Judge Underwood dissented. His position in reference to the litigation is stated in the aforementioned opinion as follows:

> "When simple restitution was blocked by the finding under the first reference to the Master that the Cummer scale was after its withdrawal as a voluntary rate not a lawful established rate because unremunerative and confiscatory, one member of this court was of opinion that restitution could not be accomplished and that the court should deny it." (R. 349).

The appeal is, therefore, from a judgment rendered by two of the three Judges constituting the court, and with a dissent of one of the Judges. We will later undertake to show that the two Judges who signed the decree from which this appeal

is taken and which was filed on April 17, 1934, were not in agreement as to an element essential to a decision of the case, and that, as a result thereof, there was in fact no decree.

Base of the Case.

On the third day of May, 1926, the Georgia Public Service Commission filed against the Atlantic Coast Line Railroad Company before the Interstate Commerce Commission a petition for the purpose of removing unjust discrimination worked against interstate commerce by the transportation of logs intrastate in Florida over the lines of the Atlantic Coast Line Railroad Company for distances up to 170 miles under the scale of rates known as the "Cummer scale."

That petition resulted in findings by the Interstate Commerce Commission dated August 2, 1928, and an order thereon (146 I.C.C. 717, Old Record* Vol. I, pp. 16, et seq.).

In that case the Commission found that:

> "It is manifest, we believe, that the intrastate rates assailed, (Cummer scale) which on the average are less than half of the proposed interstate rates, are less than reasonably compensatory. * * * We further find that the Florida intrastate rates assailed, which are lower than the interstate rates herein found reasonable for corresponding distances, result, and will result, in undue preference and advantage of shippers of intrastate traffic within the State of Florida, in undue prejudice to shippers of interstate traffic from points in the State of Florida to points in the State of Georgia, and in unjust discrimination against interstate commerce.

* Old Record refers to the record in cases No. 16, 17 and 18, October Term, 1930, in the Supreme Court of the United States which by stipulation is a part of the record in this case.

"We further find that said undue preference and advantage, undue prejudice, and unjust discrimination can and should be removed by the establishment of rates for intrastate application within Florida which shall correspond with the rates herein found reasonable for interstate application from Florida to Georgia." (146 I.C.C. 724-725, O.R.-25-26.)

The Interstate Commission issued an order on said findings, part of which is as follows:

"*It is further ordered*, That said defendant be, and it is hereby, notified and required to cease and desist from practicing the undue preference and advantage, undue prejudice, and unjust discrimination found in said report to exist in the relation of intrastate and interstate rates and to establish, put in force, and maintain rates for the transportation of logs, except walnut, cherry and cedar, in carloads, minimum weight 40,000 pounds, in intrastate commerce within the State of Florida which shall be the same as those prescribed in the next preceding paragraph hereof as reasonable for transportation in interstate commerce from points in the State of Florida to destinations in the State of Georgia.

"*And it is further ordered*, That this order shall continue in force until the further order of the Commission." (O.R.-Vol. 1, p. 27.)

Bills were filed in the United States District Court for the Northern District of Georgia to enjoin the aforementioned order of the Interstate Commission; and on January 7, 1929, the District Court dismissed those bills and in its opinion indicated that the effectiveness of the Interstate Commission's order should be confined to shipments originating in a defined territory in the northern part of the State of Florida. (See *State of Florida, et al v. United States, et al*, 30 Fed. (2d) 116.)

On February 7, 1929, the Interstate Commission amended its order of August 2, 1928, (O.R.-Vol. 1, 26-28, 91) so as to prescribe that the same be effective "within and throughout the entire State of Florida without exception."

Supplemental bills were then filed by complainants; a rehearing granted in the District Court; and on March 22, 1929, the court denied the prayers of complainants to enjoin the order of the Commission as amended, and dismissed the bills. (*State of Florida, et al v. United States, et al,* 31 Fed. (2) 580.)

The rates which the Interstate Commission thus prescribed for interstate commerce from points in Florida to points in Georgia and which the Commission likewise prescribed for intrastate transportation of logs over the Atlantic Coast Line Railroad Company in Florida for distances up to 170 miles, went into effect on February 8, 1929.

Appeal was taken to this Court from the aforementioned judgments of the United States District Court for the Northern District of Georgia dismissing the original and supplemental bills of complaint brought by the State of Florida, et al against the United States of America, et al, seeking to enjoin and nullify the order of the Interstate Commission of August 2, 1928, as amended as aforesaid. Said appeal is reported under the style of "*State of Florida, et al v. United States of America, et al,*" 282 U.S. 194, decided January 5, 1931.

This Court reversed the findings of the lower court. In its opinion at page 215 of 282 U.S. this Court found that:

> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the im-

portance of which this Court has recently adverted (*The Beaumont, Sour Lake & Western Railway Company v. United States, ante*, p. 74), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported. If the facts as to intrastate transportation of logs in Florida are such as to justify an order as to intrastate rates in order to end an unjust discrimination as against interstate commerce either as between persons and localities, or because of an undue burden upon the revenues of the carrier, the Interstate Commerce Commission is still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require."

Prior to the sending down of the mandates from this Court the Atlantic Coast Line Railroad Company filed a motion in this Court (Filed in Clerk's office January 23, 1931) in which it prayed in part as follows:

"That this Court enter such order as it may deem wise, either staying the mandate in this Court until the Commission has acted in this cause in the light of the opinion of this Court entered therein, or until this Court shall, for cause shown, otherwise direct; or

"That this Court, in sending down its mandate to the District Court for the Northern District of Georgia, direct the said court to maintain the status as to the said intrastate rates now existing until the said Commission shall have acted or until the said Court, for cause shown, shall have otherwise ordered." (See Stipulation R. Vol. I, p. 407).

This Court denied the prayers of that motion. However, the mandates as sent down contained the following command to the District Court:

> "You, therefore, are hereby commanded that such further proceedings be had in said cause in conformity with the opinion and decree of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding." (R. Vol I, p. 2).

The three bills which had been filed in this cause were consolidated by order of the court on January 3, 1929, (O.R.-Vol. I, p. 43) under the style of *State of Florida, et al v. United States et al.*

Motions for Decree in Accordance with the Mandates and for Order of Restitution.

Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company on February 28, 1931, presented to the United States District Court for the Northern District of Georgia their motion for "A decree in accordance with the mandate and an order of restitution" (R. Vol. I, pp. 7 et seq.); and this was allowed to be filed.

The Wilson Lumber Company of Florida filed a like motion (R. Vol I, p. 11); and the State of Florida, through its attorney-general, the members of its Railroad Commission and special counsel for the Commission, filed a like motion (R. Vol. I, p. 15). The first two of said motions were filed on behalf of the respective movants. The third of those motions sought to recover overcharges for such persons and corpora-

tion as had paid rates for the transportation of logs intrastate in Florida over the Atlantic Coast Line for distances not exceeding 170 miles, on the basis of the scale of rates fixed as aforesaid by the Interstate Commerce Commission. The complainants in said motions moved the District Court to render decrees against the Atlantic Coast Line Railroad Company requiring it "to restore to complainants the amounts paid by them to said intervenor and defendant because of the erroneous decrees heretofore entered by this Court herein." (R. Vol. I, p. 8).

In support of said motions each of the complainants alleged that:

> "Because of the dismissal of this cause by this court as aforesaid of its bill of complaint and supplemental bill of complaint herein instead of a decree as prayed in complainant's said bill of complaint and supplemental bill of complaint herein, setting aside and annulling and enjoining the enforcement of such part or parts of the order of August 2, 1928, of the Interstate Commerce Commission as amended and clarified in its Docket No. 18364 as are prayed in and by said bill of complaint and supplemental bill of complaint to be set aside and annulled and enjoined as aforesaid complainant was compelled to pay and did pay to the said Atlantic Coast Line Railroad Company, from the effective date of said order of the Interstate Commerce Commission, as amended and clarified, as aforesaid, to-wit: February 8, 1929, for the transportation of logs, except walnut, cherry and cedar, and except ash, gum, hickory, oak, pine and cypress logs not over six feet in length, in intrastate commerce within the State of Florida over the lines of said intervenor and defendant, Atlantic Coast Line Railroad Company, for distances not exceeding 170 miles, the rates so prescribed by the said unlawful and

invalid order of the Interstate Commerce Commission, as amended and clarified as aforesaid. That the said rates so paid as aforesaid by the complainant to said intervenor and defendant, were in excess of the lawful state rates for such transportation of such logs, viz., the scale of State rates which were established and maintained in intrastate commerce subject to the authority of the State of Florida, and published as required by its laws and which were in force and effect for the transportation of such logs in intrastate commerce in Florida when such invalid and unlawful order of the Interstate Commerce Commission became effective and which the said invalid and unlawful order purported to supersede. If this court had entered in the first instance the decree which the Supreme Court of the United States has adjudged this court should have entered, this complainant would have paid to the said intervenor and defendant for such transportation of such logs in such intrastate commerce only said lawful State rates, and said intervenor and defendant has accordingly therefore benefit from the erroneous decrees of this court, in the amount and to the extent that the transportation charges for such transportation of such logs so paid by complainant as aforesaid, exceeded the transportation charges lawfully payable for such transportation of such logs computed upon and established by said lawful State rates." (R. Vol. I, pp. 8, et seq.).

Complainants moved the court to make and enter a decree adjudging and decreeing that they were "entitled to restitution of all such overcharges so paid" by them "to the Atlantic Coast Line Railroad Company, as aforesaid, together with interest thereon at the legal rate in Florida from and after the respective dates of the payment of all such overcharges as aforesaid." (R. Vol I, p. 9).

The effect of these motions was to pray that the United States District Court for the Northern District of Georgia should enter the mandates from this court and render decrees against the Atlantic Coast Line for the difference between the sums the Atlantic Coast Line would have collected if the Cummer scale of rates had been in effect and had been applied and the rates which had been ordered in effect by the Interstate Commerce Commission in the proceedings to which reference has been made; and which were evidenced by tariffs duly and legally filed with the Interstate Commerce Commission and with the Florida Railroad Commission.

The period which is sometimes referred to as the "restitution period" began with February 8, 1929, and ended April 10, 1931.

Petitions to Interstate Commerce Commission to Reopen Case.

Georgia Public Service Commission and Atlantic Coast Line Railroad Company had in the meantime filed with the Interstate Commerce Commission motions to reopen the proceedings in its Docket No. 18364 in which the aforementioned findings of August 2, 1928, and the order thereon had been made, and prayed the Interstate Commission "to proceed to make the findings indicated in said opinion of the Supreme Court of the United States to be necessary and proper to be made." The Atlantic Coast Line prayed in its motion to the Interstate Commerce Commission that the said findings be made and that the "Florida intrastate rates known as the Cummer scale of rates be set aside under sections 3 and 13 of the Interstate Commerce Act." (See R. Vol. I, p. 494).

The Atlantic Coast Line filed its responses to the complainants' several motions for decree in accordance with the mandates and for order of restitution. These will be found at Record pages 27 et seq., Vol. I.

Summary of Responses of the Atlantic Coast Line Rd. Co.

In its said responses Atlantic Coast Line Railroad Company sought to have restitution denied to each complainant upon the following grounds: (R. Vol. I, pp. 27, et seq.).

1. The Cummer scale of rates; that is, the Florida intrastate rates for hauling logs over the Atlantic Coast Line Railroad for distances up to 170 miles, was not in effect during the time involved in this cause because their enforcement had been enjoined by the United States Circuit Court of Appeals for the Fifth Circuit in circumstances to be hereafter stated.

2. The Cummer scale of rates was changed or suspended by the Florida Commission by its orders Nos. 979 and 990 issued on April 20, 1929, and remained under such suspension until after the mandate of this court in these cases had been sent down to the District Court.

3. The Railroad Company had filed its tariffs expressing the rates fixed by the Interstate Commission in its order of August 2, 1928, with the Interstate Commission and with the Florida Commission prior to the effective date of said order of the Interstate Commission, to-wit: February 8, 1929, and said tariffs remained so filed during all of the time involved.

The Railroad Company further therein stated the findings of the Interstate Commission to the effect that the Cummer

scale of rates was less than reasonably compensatory and that they worked unjust discrimination against interstate commerce; it alleged that the said Cummer scale of rates was unjust and unreasonable and confiscatory and that this was true during all of the times involved in this cause; and that the District Court had found that "on the face of things the log rate is too low and likely to burden the carrier."

The bases for the allegations that the Cummer scale of rates was unjust, unreasonable and confiscatory, and if enforced would require the transportation of the logs involved without compensation that would be reasonable and just, and that the enforcement of such rates would work confiscation of the railroad's property, were set out in detail in said responses (R. Vol. I, p. 35, et seq.).

It also alleged in its said response that the amount of timber on the Atlantic Coast Line's lines in Florida was extensive; that the Brooks-Scanlon Corporation had represented that it controlled 1,027,432,000 feet of pine and cypress timber; and that this was equivalent to about 186,000 carloads of logs; and that other shippers who were complainants in the several bills in equity involved in this proceeding owned standing timber sufficient to make about 267,786 cars of logs; and that besides these tracts there were other large tracts and many small ones on its lines in Florida; that the aggregate difference in revenue to be produced to it from the movement of said logs, if the same be moved under the Cummer scale as compared with a reasonable scale of rates; that is, as compared with the scale fixed by the Interstate Commerce Commission, or rates for like transportation used over the lines of roads in Florida, would be a very great sum, amounting to several millions of dollars.

The Railroad Company also alleged that the enforcement of said Cummer scale of rates would impose upon it the duty of devoting its property to such transportation service either without any reward over and above the cost thereof, or if any reward, such reward would be inadequate.

The Railroad Company also alleged that the application of the Cummer scale of rates for future transportation should not be required and that to do so would have the effect of requiring it to render transportation service at rates which would not provide the cost of transportation and which would be confiscatory.

The Railroad Company further alleged that to require payments from it as restitutions on the basis of the Cummer scale of rates would be as though it were required to put into effect the rates adjudged to be unreasonable by the District Court in this proceeding; that the Railroad Commission of Florida had no statutory, or other, right to prescribe or enforce any rates for the transportation of the commodity involved which was unreasonable; and that the rates which the claimants sought to enforce were unreasonable and were never at any time within the power of the Florida Commission to prescribe or enforce; that the Florida Commission had no right or power to prospectively require the enforcement of the scale of rates known as the Cummer scale; that to require the Railroad Company to make payments to movants by way of restitution on account of the shipment of said logs on February 8, 1929, would be to require it to yield to an unlawful and unreasonable rate and would be a taking of its property without due process of law and would deny to it the equal protection of the law, contrary to the Fourteenth Amendment of the Constitution of the United States.

The Railroad Company also alleged that it had filed with the Interstate Commerce Commission and that the Georgia Public Service Commission had likewise filed with the Interstate Commission, a motion to reopen the proceedings in its Docket No. 18364 and to proceed to make the findings indicated in the opinion of the Supreme Court of the United States to be necessary and proper to be made; and that the Railroad Company had also prayed in its said motion that the Florida intrastate rates, known as the Cummer scale, be set aside under Sections 3 and 13 of the Interstate Commerce Act. (R. Vol. I, p. 41).

Order of the District Court of March 7, 1931.

On the 7th day of March, 1931, the District Court entered an order (R. Vol. I, p. 53) directing that the mandate of the Supreme Court be entered upon the minutes, and "enjoined, set aside and annulled" the order of the Interstate Commerce Commission of August 2, 1928, as amended. The District Court further ordered:

> "In further pursuance of said mandate directing further proceedings in conformity with the opinion of the court, the pleadings now filed in this cause seeking restitution for the complainants and those opposing the same by defendants, and asking further equitable relief, are reserved for further consideration, the court hereby retaining jurisdiction for the further hearing of the same and decision thereupon, and jurisdiction is further reserved for the consideration of any and all other questions proper to be considered in the cause." (R. Vol. I, pp. 53, 55, 56).

First Amendment by the Coast Line to Its Responses to Motions for Orders of Restitution.

On March 17, 1931, (before further action by the Court) the Atlantic Coast Line filed its first amendment to its responses to the several motions for orders of restitution (R. Vol. I, p. 56, et seq.). This amendment set up with some detail the activity of the Florida Railroad Commission in their efforts to have the Cummer scale of rates retained. These efforts included, as alleged in the amendment, the appearance of the Florida Commission before the Interstate Commerce Commission in the proceeding out of which the order of August 2, 1928, was issued; that the Florida Commission offered evidence to the effect that the Cummer scale of rates was just and reasonable; that the Florida Commission then filed its bill in the District Court in this cause undertaking to restrain the order of the Interstate Commission of August 2, 1928, setting aside the Cummer scale of rates; that it had persistently undertaken to sustain said Cummer scale of rates as reasonable; that it had sought an injunction against the Atlantic Coast Line in the Circuit Court of Duval County, Florida, to restrain and enjoin the Railroad from putting into operation any rates but the Cummer scale of rates except on certain lines mentioned in its (Florida Commission's) order No. 979; that it had procured that injunction in the State Court of Florida; that it had resisted the effort of the Railroad Company to remove that cause into the United States District Court for the Southern District of Florida; that it had opposed an ancillary bill filed by the Railroad Company seeking to restrain order No. 979 and the order of the Circuit Court of Duval County; that it

had opposed a bill filed by the Railroad in the Northern District of Florida; and that it had then prosecuted their appeal to the Supreme Court of the United States and there asserted the Cummer scale of rates to be reasonable.

The Railroad Company made various other allegations in its amendment to show that the Florida Commission had not taken an impartial attitude and that further appearance by the Railroad Company before it to have the Cummer scale of rates displaced, if that had been necessary, would have been a useless waste of time and energy.

Second Amendment by the Coast Line to Its Responses to Motions for Orders of Restitution.

On April 15, 1931, (also before further action by the Court) the Atlantic Coast Line filed its second amendment to its responses to the several motions of the claimants for orders of restitution (R. Vol. I, p. 60). It there alleged that on April 6, 1931, the Interstate Commerce Commission had issued an order reopening the proceeding in its Docket No. 18364; that is, the proceeding out of which the order of August 2, 1928, was issued; that the reopened proceeding had been assigned for further hearing on May 4, 1931. A copy of the Interstate Commission's order was set out in the second amendment (R. Vol. I, p. 61). The Railroad Company then called the court's attention to the provision of the mandate issued by the Supreme Court in this cause, which has been hereinbefore set out. (R. Vol. I, p. 62).

The Railroad Company averred that, for the reasons set out in its original response and the first amendment thereto,

"It is right and just that the action of this court in the matter of restitutions should be withheld pending the action of the Interstate Commerce Commission in the proceeding above referred to in its Docket 18364." (R. Vol. I, p. 62).

In its first amendment to its responses to the motions for orders of restitution the Coast Line prayed in part that:

"This court withhold action upon the prayer for restitution made by appellants in their original motion until the Interstate Commerce Commission shall have acted upon one or both of the two petitions or motions which have been filed with it in this matter, and which are referred to in its original response, and that it withhold action while the said Commission, which the Supreme Court in its opinion in this cause declared 'is still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require,' proceeds to exercise that liberty and to make the determinations which this situation does require.

"That this court restrain the Florida Railroad Commission, their officers and agents and attorneys, from further proceeding to enforce the scale of rates known as the Cummer scale of rates or to put the same into effect, and that upon final hearing the Cummer scale of rates be enjoined, held to be unjust and unreasonable, less than compensatory, and confiscatory; and that they be annulled; * * *

"That such temporary restraining order as may be necessary, proper or appropriate, to carry into effect the prayers of the original response and this amendment be entered, and that upon the final hearing upon this response and the amendment thereto the said restraining order be made permanent, and injunction issue enjoining and annulling the aforementioned scale

of rates known as the Cummer scale of rates; * * * " (R. Vol. I, p. 58, et seq.).

And in its original response the Atlantic Coast Line had prayed that:

> "The mandate from the Honorable the Supreme Court of the United States be not now entered in this cause; but that this cause proceed, in conformity with the opinion and decree of the Supreme Court, to the ascertainment of that which should be done according to right and justice in accordance with the laws of the United States, and upon such ascertainment said mandate be entered and decree be rendered.
>
> "That, if the said mandate be now entered, that such order or orders and proceedings be had and entered as will adequately preserve the status while this court proceeds through its proper processes to determine, in conformity with the opinion and decree of the Supreme Court, that which is right and just to the parties and to this respondent and that upon the ascertainment of that which is right and just to be done this court enter its order or orders and decree or decrees accordingly.
>
> "That it be determined by this court that this respondent is under no obligation to make any payments to any of the persons mentioned in the motions of the movants herein on account of overcharges or restitution;
>
> "That it be determined that the Cummer scale of rates was not in force at any time as to the traffic here involved on or after the 8th day of February, 1929;
>
> "That it be determined that the Cummer scale of rates is unjust, unreasonable and confiscatory and the application of them over the Atlantic Coast Line be permanently enjoined.) (R. Vol. I, pp. 42, 43).

Order of the District Court on Motions for Orders of Restitution.

On July 31, 1931, the District Court entered its order upon the motions of the complainants for restitution and the responses of the Atlantic Coast Line in opposition thereto and the motions to strike said answers or responses. (R. Vol. I, p. 65, et seq.). This order adjudged that:

> "On the intervention of the Atlantic Coast Line Railroad Company this specially constituted statutory court is without jurisdiction to enjoin rates established by the State of Florida for intrastate traffic, or to revise or amend the same. All prayers of the Atlantic Coast Line Railroad Company to this intent are therefore dismissed and stricken, without prejudice to any relief it may be elsewhere entitled to seek." (R. Vol. I, p. 65).

The said order referred the cause to a special master

> "to ascertain and report to this court the sums severally due to the complainants or other persons represented by the Florida Railroad Commission in this suit by the Atlantic Coast Line Railroad Company as overcharges exacted between said dates by virtue of the said invalid order of the Interstate Commerce Commission, as measured by the difference between the amount collected and the established lawful rate in force at the time each shipment was made, as the Master may find it to have been. The Master shall require specific claims filed by each claimant, and proof as to each item unless agreed upon, and shall report all items with dates thereof, distinguishing those arising on shipments from points north of Jacksonville, Gainesville, Burnett's Lake and High Springs from those arising south thereof, and those of date prior to April 20, 1929, when the Florida Railroad Commission is alleged to have altered its State rates, and

classifying the findings otherwise as he may find necessary or convenient." (R. Vol. I, p. 66).

Claims were filed with the Master on behalf of the Brooks-Scanlon Corporation, Cummer Cypress Company, Wilson Cypress Company, Wilson Lumber Company of Florida and by the Florida Railroad Commission for the use and benefit of twenty-seven shippers. Those claims were submitted to the Atlantic Coast Line Railroad Company and were checked by that Company; and thereupon it filed its answer to each of those claims (R. Vol. I, p. 307, et seq.).*

ANSWER OF ATLANTIC COAST LINE TO CLAIMANT'S CLAIMS.

The first paragraph of each answer is as follows (leaving out amount):

> "The amount of claimant's claim to the extent of $——— represents the difference between the aggregate of the sums collected by this respondent from claimant for the transportation of logs over its lines in Florida at the times mentioned in said claim, and the aggregate of the sums which would have been collected by it for such transportation if the scale of rates known in the record of this cause as the 'Cummer' scale of rates had been applied." (Appendix No. 2).

There was no controversy as to the amount of each claim when stated upon the basis above quoted. That is, claimants asserted that their right to recovery was based upon the Cummer scale of rates. They admitted that they could not

* This answer is omitted from the printed record. Under the fourth paragraph (R. Vol. I, 484) of the stipulation beginning at R. Vol. I, 467, we have the right to refer to it as though it were printed. Copy of said answer is reproduced as Appendix No 2 to this brief.

recover all of the moneys which they had paid to the Railroad Company for the transportation of the logs. They sought to recover the gross amount of those payments less that which they would have paid if the Cummer scale of rates had been charged.

The Railroad Company's answer to each claim denied that it was indebted to the claimants in the amounts stated, or in any other sum for the reasons that:

(1) "Said claim is not measured by the difference between the amount collected by the Atlantic Coast Line Railroad Company from the claimant and the established lawful rate in force at the time each of the shipments which made the basis of said claim was made;

(2) "The said claim is based upon the amount paid by the claimant to the Atlantic Coast Line Railroad Company on said shipments, less the amount which would have been paid had the scale of rates known as the Cummer scale of rates been in force, which method of calculation is erroneous;

(3) "The said Cummer scale of rates was not in force or effect when any of the said shipments moved"

(a) Because of the Florida Commission's order No. 979 issued January 30, 1929;

(b) Because of the restraining order issued out of the United States Circuit Court of Appeal for the Fifth Circuit on February 14, 1929;

(c) Because of the Florida Commission's order No. 990 issued April 20, 1929, suspending said Cummer scale of rates;

(d) Because the Cummer scale of rates upon which claimants' claims were based was unjust and un-

reasonable for all the reasons set out in the Atlantic Coast Line's response and its amendments thereto, theretofore filed;

(e) Because the Cummer scale of rates was confiscatory;

(f) Because the Cummer scale of rates was without the power of the Florida Commission.

(4) "The Railroad Company further alleged that the Interstate Commerce Commission had filed a tentative report in the reopened proceeding in its docket 18364 and in said tentative report the Cummer scale of rates had been found to be unreasonable and unjustly discriminatory against interstate commerce.

(5) "The Railroad Company averred that no action should be had "in this proceeding until the Interstate Commerce Commission has taken final action upon the above mentioned tentative report."

(6) "It also averred that no action should be taken against it "in this proceeding until the Interstate Commerce Commission shall have determined whether or not there should be restitution by this respondent; and until said Commission shall have fixed the standard to be applied in determining the extent of the said restitution in the event there shall have been a finding that this respondent should make restitution."

(7) "It further alleged:

"In addition, and for all of the causes set out in the response and amended response of the Atlantic Coast Line Railroad Company, heretofore filed in this cause, the said Cummer scale of rates is not the proper basis for restitution in this cause and should not be used as such basis."

First Hearing Before the Master.

The cause proceeded to trial before the Special Master on January 29-30, 1932. During said hearing the Atlantic Coast Line made the contention that the Florida rates on intrastate shipments of logs, known as the Cummer scale of rates, which claimants contend was in force during the time shipments of logs were made by claimants, was unreasonable, unjust and confiscatory and therefore void and offered testimony in support of this contention and for the purpose of showing that it was true. This was objected to by counsel for claimants on the ground that neither the District Court nor the Special Master had authority to pass on the question as to whether or not said rates were valid or invalid. (R. Vol. I, p. 485 to Vol. II, p. 636).

The Master certified the question of the admissibility of said evidence to the court for direction. (R. Vol. I, p. 67).

On March 16, 1932, the District Court entered its order on said petition of the Special Master. (R. Vol. I, p. 69). The court replied to the petition of the Special Master in part as follows:

> "We intended to refer such contentions to the Master for his investigation and decision, not being ourselves sufficiently advised as to the law of Florida by which they are governed for us at once to pass upon them. In making restitution this court should deprive the party benefiting by its erroneous decision of all benefit of the order of the Interstate Commerce Commission which the court should have restrained, but should not deprive that party of any right otherwise; for the charges sought to be recovered were not directly collected by virtue of any

judgment or process of this court but the court is involved only because it failed to interfere. We are of opinion that if the Atlantic Coast Line Railroad Company had, without intervening in this case and becoming a party to this litigation, made the charges it did and in a suit brought by the shippers in a State court to recover as for overcharges could under the law of Florida have defended its charges as it now proposes, it should have the same right in this proceeding. If, on the other hand, in such a suit the Cummer scale under the law of Florida would have been the conclusive measure of the lawful charge it should be so treated by the Master here." (R. Vol. I, pp. 69-70).

Each of the claimants thereafter contended, and continued to contend, that the sole measure of their damages was the difference between the amounts paid by them respectively to the Atlantic Coast Line Railroad Company under the scale of rates fixed by the Interstate Commerce Commission, and the amount which would have been paid if the Cummer scale of rates had been charged.

Proceedings Before the Master.

The Master received evidence from the Railroad Company tending to show that the Cummer scale of rates was, during the restitution period; that is, from February 8, 1929, to April 10, 1931, unjust, unreasonable and confiscatory.

The seventh finding of the Special Master's report of November 14, 1932, (R. Vol. I, p. 70, et seq.), is as follows:

> "The Master finds under the evidence that the Cummer scale of rates from February 8, 1929, to March 5, 1931, was unreasonable and unjust and did not furnish an adequate return on properties used." (R. Vol. I, pp. 86-92).

He also found that there was no lawful established rate in force at the time any shipment of logs involved in this case was made. (R. Vol. I, pp. 87-88).

Exceptions were filed to the Master's first report by each of the parties in this cause. (R. Vol. I, pp. 95-147).

The District Court considered the Master's first report and the exceptions thereto and on January 30, 1933, filed its opinion (R. Vol. I, p. 159, et seq.). The court was unanimous in sustaining the Master's finding that the Cummer scale of rates was confiscatory (R. Vol. I, pp. 164, 169-170). A majority of the court re-referred the case to the Master. Mr. District Judge Underwood dissented from the opinion of the court in the following language:

> "I respectfully dissent, except I concur in the finding of fact that the rates of the Cummer scale, if not consented to or acquiesced in by the Atlantic Coast Line Railroad but enforced over its opposition, would be confiscatory." (R. Vol. I, p. 172).

CONDITION IN THE ORDER OF THE COURT RE-REFERRING THE CAUSE TO THE MASTER.

With its opinion of January 30, 1933, the court entered an order of re-reference to the Master which contained the following:

> "Upon considering the master's report and the exceptions thereto. IT IS ORDERED that the exceptions be overruled and the report confirmed so far as it has gone and except as modified by conclusions of law and fact filed herewith. *Under the special circumstances of this case we adjudge that the claimants of restitution should have the same only upon condition that they submit to an in-*

vestigation of the true rights of the carrier to collect for the transportation of their logs during the period covered by the restitution, and submit to such adjudication as will justify and finally settle the accounts between such claimants and the carrier. To this end we recommit this matter to the master, with direction that he ascertain whether the charge made by the carrier for transportation in each instance was a reasonable one as measured by common law standard, and if not, what was the reasonable charge to be made, and that he measure and award to each claimant restitution accordingly." (R. Vol. I, pp. 172-173).
(Italics added.)

Motion of Atlantic Coast Line as to Accounting for the Period (April 10, 1931—February 25, 1933) Succeeding the Re-instatement of Cummer Scale and the Second Establishment of the Interstate Commission's Scale of Rates.

On the 15th day of March, 1933, (after the order of re-reference, and after the Cummer scale had been in effect the second time for about two years) the Atlantic Coast Line Railroad Company filed with the District Court a motion (R. Vol. I, p. 173), in which it recited the circumstances which have been herein set out leading up to the opinion and judgment of this Court of January 5, 1931, (282 U. S. 194); the issuance of the mandate; the entry of said mandate in the District Court on March 7, 1931; and especially calling attention to the fact that the claimants had insisted that the measure of their claims for restitution was the difference between the sums collected under the scale of rates fixed by the Interstate Com-

merce Commission during the period they were applied and the sums which would have been collected had the Cummer scale of rates been applied; and to the fact that the Master had found the Cummer scale of rates to be not just and reasonable; and that the court had concurred in that finding. (R. Vol. I, p. 180).

The Coast Line then submitted to the court in its motion that there should then have been a decree entered against the claimants and in its favor, holding that it was not indebted to claimants in any sum whatsoever.

It also referred to the fact that the Interstate Commerce Commission had reopened the proceedings in its Docket No. 18364 and that hearings had been had thereon, extensive evidence taken, argument had, and a report and order entered thereon; that when it, in response to the proceedings had and the mandate of the Supreme Court and of the order entered thereon, had ceased charging for the transportation service rendered by it in hauling logs intrastate in Florida, based on the scale of rates fixed by the Interstate Commerce Commission, and returned to the scale of rates known as the Cummer scale, it issued notice to all shippers and consignees of logs of the kind involved, including all the claimants who were then asserting the right of restitution against it; said notice being in substance as follows:

> "Until further notice, the Atlantic Coast Line Railroad Company will transport logs (except cedar and except ash, gum, hickory, oak, pine and cypress logs, not over six feet in length) for distances 170 miles and under, presently collecting therefor on basis of the mileage scale of rates (Cummer scale) formerly published at top of page 413 of Agent Glenn's ICC A-659 (Southern Lumber Tariff) ACL RR's Freight Tariff No. 10930,

but you are now advised if the scale of rates just referred to is not the applicable rate or rates now in effect, the Atlantic Coast Line Railroad Company will later make demand for revenue based on the applicable rates." (R. Vol. I, p. 177).

The Railroad Company then alleged in said motion that all the shipments of logs thereafter made intrastate in Florida over its lines at the rates known as the Cummer scale of rates by those who were then claiming restitution against it, were made under protest and under notice to said claimants by it that it would later claim of them and all other shippers, if the Cummer scale of rates was not the applicable scale, additional revenue on the basis of the applicable scale of rates. The transportation of logs by the Coast Line intrastate in Florida, subsequent to the re-establishment of the Cummer scale proceeded on the basis of the latter rates until February 25, 1933, when the second order of the Interstate Commission went into effect.

The Railroad Company further alleged in said motion that during the period beginning with the discontinuance of the use of the scale of rates prescribed by the Interstate Commerce Commission in its order of August 2, 1928, as amended —April 10, 1931, to February 25, 1933, when the Commission's reports and orders in the reopened proceedings had resulted in re-establishing the rates which were ordered into effect by the Interstate Commerce Commission's order of August 2, 1928, and in the finding that the Cummer scale of rates was unjust, unreasonable and unjustly discriminatory against interstate commerce, nearly two years had elapsed; and during that period it had been required by the claimants to transport logs for them over its lines in Florida for distances up to 170 miles on the Cummer scale of rates. (R. Vol. I, p. 179).

The Railroad Company claimed in said motion that it was unjust and unreasonable for the claimants to have required it to render its transportation service under a scale of rates which was unjust, unreasonable, confiscatory and discriminatory against interstate commerce; that it had protested against the rendering of such service under said scale of rates and had asserted to the claimants who required such service that it would seek a correct accounting based upon the applicable scale of rates at the proper time; that the claimants had required the service of the Coast Line under the notice of protest and the terms thereof above referred to. (R. Vol. I, p. 180).

The Coast Line submitted in its said motion that the District Court in the first instance, could not determine the just and reasonable rates to be charged for the period involved in the claims for restitution, nor what was the rate which, being just and reasonable, was not unjustly discriminatory against interstate commerce during that period; but that those questions were for at least preliminary determination by the Interstate Commerce Commission; and until the Interstate Commission

> "shall have determined whether the Atlantic Coast Line made any overcharge against the claimants, or any of them, and the amount of such overcharge, if any was so made, the court should not undertake to fix the rate which should have been applied during the period covered by the claims for restitution." (R. Vol. I, p. 181).

The Atlantic Coast Line Railroad Company further alleged in its said motion that, in the event the court should not maintain its position as above set out, but should maintain the position that the court has jurisdiction to fix the rate to have

been charged during the period for which restitution was claimed by the claimants in the claims filed by them for the transportation service rendered for them, then the Railroad Company was uncertain as to whether the order of the court of January 30, 1933, re-referring the case to the Special Master permitted it to have such an accounting of the claims as would take into consideration its rights arising since the entering by the District Court of the mandate of the Supreme Court in March, 1931; and that unless the claimants were required to submit to an accounting for the transportation service rendered to them after the entry of the mandate in March, 1931, which transportation service was paid for by the claimants on the basis of the unjust, unreasonable, confiscatory and discriminatory scale of rates known as the Cummer scale, it, the Railroad Company, would have been required to render transportation service over its protest at a scale of rates which had been determined by the District Court and by the Interstate Commerce Commission to have been unjust, unreasonable and unjustly discriminatory against interstate commerce. (R. Vol. I, p. 182).

The Railroad Company further averred in its said motion that in order to do complete equity it was necessary that the claimants submit to an investigation of the true rights of the carrier to collect for the transportation of their logs not only during the period covered by the restitution but also by the period covered from the effective date of the restored Cummer scale of rates which was April 10, 1931, to the date on which the scale of rates fixed by the Interstate Commerce Commission was re-established and restored, to-wit: February 25, 1933; and to submit to such an adjudication as would justly and finally settle the accounts between such claimants and the carrier. (R. Vol. I, p. 183).

The Coast Line alleged in its said motion that in the event the District Court held that it had the right and jurisdiction to fix the reasonable, just and non-discriminatory rates to be applied during the periods involved, it desired to be allowed to file with the court and the special master a statement as to the transportation service rendered by it, intrastate in Florida, during the latter period (April 10, 1931, to February 25, 1933) to any of the persons who were claimants or who might become claimants for restitution against it. (R. Vol. I, p. 183).

The Railroad Company also alleged in said motion that if the District Court determined that it had not the right to fix the just, reasonable and non-discriminatory rates to be applied to the transportation service rendered during said period (April 10, 1931, to February 25, 1933) then it desired

> "that this proceeding be suspended until it can submit to the Interstate Commerce Commission its claims against said claimants and the said Commission shall fix the scale of rates which is just, reasonable and non-discriminatory to be applied for the service rendered during said period." (R. Vol. I, p. 184).

These allegations were accompanied by adequate and appropriate prayers and were duly sworn to. (R. Vol. I, pp. 184-185).

On March 20, 1933, the District Court entered an order declining to enlarge its jurisdiction beyond the scope set forth in its previous order of reference; and denying the motion to reopen the order of re-reference to the Master. (R. Vol. I, pp. 186-187).

Second Hearing Before the Master on the Order of Re-reference.

The cause proceeded to hearing before the Master on the re-reference.

Failure of Claimants to Comply With the Condition on Which the Re-reference Was Made.

At the opening of the hearing before the Master on the re-reference on March 27, 1933, Counsel for complainants addressed the Master, stating:

> "If the court please, I would like to have the record show at the outset that we do not confess the errors of our way or the wisdom or propriety of the decision of the Master and of the court in the determination that the Cummer scale is not a just and lawful measure for restitution to be made us. We wish to save the point though we do now proceed and in proceeding insist that we are right and so proceeding does not cut off our rights in any court of appeal or otherwise to insist that the Cummer scale is the proper measure." (R. Vol. II, p. 738).

Counsel for the Atlantic Coast Line Railroad Company replied as follows:

> "If your honor pleases, the order of re-reference in this case contains the following sentence:
>
> "'Under the special circumstances of this case we adjudge that the claimants of restitution should have the same only upon condition that they submit to an investigation of the true rights of the carrier to collect

for the transportation of their logs during the period covered by the restitution, and submit to such an adjudication as will justly and finally settle the accounts between such claimants and the carrier.'

"It also contains the following sentences:

"'To this end we recommit this matter to the Master, with direction that he ascertain whether the charge made by the carrier for transportation in each instance was a reasonable one as measured by common law standard, and if not, what was the reasonable charge to be made, and that he measure and award to each claimant restitution accordingly.'

"Then in the order of March 20, 1933, the court said:

"'We have sustained our jurisdiction to make restitution for the period covered by our erroneous refusal to enjoin the attacked order, and this alone, under the equitable conditions which we imposed, is now before the Master.'

"We submit that the statement of our learned opponent does not comply with the requirements of either of these orders and that until compliance shall have been made by them, they have no right to proceed in this re-hearing; that the proceeding proposed by them does not conform to the requirements of the court in either of the orders mentioned. The result is we object to the proceeding in this cause by the claimants." (R. Vol. II, pp. 738-739).

The Master in his report did not pass upon this question; that is, the meaning of the condition imposed upon the claimants by the order of re-reference. He left it for determination by the District Court. (R. Vol. I, pp. 191, 192).

The Atlantic Coast Line Railroad Company asserted that the claimants had made an election of remedies and had

decided to proceed in their case on the theory that the Cummer scale of rates was the standard of measure of their claims of recovery and to contend that the Railroad Company had no right to set up in defense of their claims that the Cummer scale of rates was either unjust, unreasonable, confiscatory, or unjustly discriminatory against interstate commerce. The Coast Line claimed that the Master was without jurisdiction to proceed in the cause; that the proceeding was inequitable; that it allowed the claimants to proceed in an equitable cause without doing the equity which the court had determined they should do.

The Coast Line preserved this position in its exceptions to the Master's report filed November 7, 1933, and which exceptions were filed November 25, 1933. (R. Vol. I, p. 225).

Disagreements of the Members of the Court.

The opinion and judgment from which the appeal is taken in this cause were rendered by a divided court, as hereinbefore stated. Mr. District Judge Underwood again dissented. (R. Vol. I, pp. 349-354). In its conclusions of law the court stated as to this subject matter, as follows:

> "When simple restitution was blocked by the finding under the first reference to the Master that the Cummer scale was after its withdrawal as a voluntary rate not a lawful established rate because unremunerative and confiscatory, one member of this court was of opinion that restitution could not be accomplished and that the court should deny it. The majority held that inasmuch as all parties were before the court and much time had already been taken and much expense incurred in in-

vestigating the matter, that it ought under the circumstances to be brought to a conclusion, and they ordered a further prosecution of it not as a simple restitution of a status with no adjudication of rights but as a final ascertainment of the true account between the Railroad Company and each shipper before the court. The question is now raised whether the claimants of restitution by going forward under the conditions then imposed on the re-reference did or did not waive all contention as to the applicability of the Cummer scale, or, to put it otherwise, whether the re-reference could proceed without a formal renunciation of that contention. One of the two judges who concurred in the re-reference is of opinion that the condition meant only that a result should be reached on full hearing of the merits of the claims, and should so adjudicate them that there should be no suits on them before other tribunals, but that there might be a full review of all rulings made in regard to the Cummer scale or otherwise. The other concurring judge is of opinion that an abandonment of the Cummer scale as a measure of the restitution was also required. His thought is not that the right of appeal from the decision of this court that the Cummer scale is void should be denied claimants, but that restitution being not an absolute right but granted *ex gratia*, the affixing of a precedent condition to the grant of the right of ascertaining what, if any, restitution is recoverable based upon compensation for service on the basis of *quantum meruit*, that there should be an abandonment of the right claimed of recovery on the Cummer scale, as such, is fair and equitable. *In view of this disagreement we cannot decide the point.* But it is immaterial in this court, since all three judges concur in the opinion that the Cummer scale is not available to measure restitution because it is confiscatory and void as an enforced rate." (R. Vol. I, pp. 349-350). (Italics added).

Mr. District Judge Underwood dissented from the final decree. (R. Vol. I, pp. 383-387).

It thus appears that two of the Judges were of the opinion that there should have been no recovery against this appellant. It is true that they reached this result by different routes, but it is equally apparent that there has been no decree against this appellant rendered in the manner required by law.

Claimants Did Not Consent That a True Accounting Be Had Between The Railroad and the Shippers.

It appears to us quite certain that the claimants elected not to proceed under the condition set out in the court's order of re-reference heretofore referred to, but on the other hand, they elected to stand squarely on their original position; that is, that the Cummer scale of rates was the sole yardstick by which their rights were to be determined; and that they were entitled to recover the full amount of the difference between what was paid under the rates prescribed by the Commission and what they would have paid under the Cummer scale of rates. This position of the plaintiffs, we believe, was an election on their part to rely upon the position taken, while the court's order required them to consent to a full investigation to the end that there might be a "*true accounting between the Railroad Company and each shipper before the court.*" Claimants' position was that the Railroad Company had no right to show that the Cummer scale of rates was unjust, unreasonable, or otherwise unlawful.

Exceptions By Atlantic Coast Line to Second Report of the Master.

These exceptions are found beginning at Record Vol. I, page 225.

They made many points as to why the Master's report was erroneous. The following is a statement of some of those points as to why the Master's report should have been rejected by the Court:

Exception 1(*a*): The subject-matter involved in the re-reference was without the jurisdiction of the court, for jurisdiction in the first instance was with the Interstate Commerce Commission.

Exception 2(*e*): The Master held that the Act of Congress authorizing the Interstate Commerce Commission to establish intrastate rates "does not in and of itself provide that the rates established by State Commission shall under any state of facts be unlawful, until they have been considered after a full hearing by the Interstate Commerce Commission and a finding made by it that they cause unjust discrimination against interstate commerce or otherwise violate the Act."

Appellant contended that this was contrary to the provisions of sections 3 and 13 (4) of the Act to Regulate Commerce.

Exception 2(*f*): The Master found that it was not necessary that intrastate rates on logs be the same as interstate rates. The appellant contended that this, when applied to the shipments in question, was contrary to the findings of fact made by the Interstate Commerce Commission in its reports in this case to be found in 146 I.C.C. 717, 724-724 and 186 I.C.C. 157, 189.

Exception 8(*h*): To the eighth paragraph of the Master's report entitled "What should have been

charged for shipment of logs during period?" and especially to that part of the finding therein as follows:

"The Master finds that the charges made by the Atlantic Coast Line Railroad Company for shipments by claimants of logs over the railroads of the Atlantic Coast Line Railroad Company in Florida, from February 8, 1929, to March 5, 1931, were not proper or lawful charges but were higher than proper or lawful charges and that the total principal amount that claimants should recover from the defendant, the Atlantic Coast Line Railroad Company, as and for overcharges on said shipments during said time shall be $99,941.77, which is 34% of the total or aggregate principal amount claimed by the claimants against the Atlantic Coast Line Railroad Company on account thereof during said period. The aggregate or total principal amount thus claimed by the claimants is $293,946.38 principal, and claimants shall recover as total principal amount from Atlantic Coast Line Railroad Company 34% of that sum besides interest on the same as hereinafter stated. Said $99,941.77 is an amount (34%) thirty-four per cent. lower than the amount of the difference between the aggregate amount that would have been collected from February 8, 1929, to March 5, 1931, respectively, on each of said shipments under the Cummer scale and the aggregate amount actually collected under the charges made respectively on each of said shipments during said time."

The Coast Line excepted to said finding as follows:

(1) "Said finding is contrary to the law, contrary to the evidence. It is based upon all the errors contained in said report to which reference has been made, including the taking into consideration of the mileage over which shipments originating or ending in Florida moved on the Atlantic Coast Line out of

the State of Florida in determining the density of traffic; and in finding that the density of traffic in Florida was not lower than the density of traffic for the system; and in finding that the cost of freight operation of the Atlantic Coast Line in Florida was not greater than for the system excluding or including Florida.

(2) "And for that said report and its findings do not give adequate effect to the findings of the Interstate Commerce Commission made in its consideration of this subject matter, in which proceedings before the Commission all of said claimants appeared in person or by representation, and which proceedings are reported in 146 I.C.C. 717; 186 I.C.C. 157; and 190 I.C.C. 588, to which reference is made. The findings of the Commission in each of said proceedings should have been held to be conclusive.

"The Master does not find that the rate which he has fixed for this transportation service would have carried its fair proportionate part of the operation and maintenance of the transportation system used in intrastate and interstate commerce. There was no evidence adduced by the claimants before the Master to justify such a finding.

"The cause was tried by the claimants before the Master on the theory that the Interstate Commerce Act of Congress did not apply.

"The rates used by the Master in fixing the amount of restitution would have been unjust, unreasonable and confiscatory.

"The rates used by the Master as the basis of his calculation when computed upon a car of 56,471 pounds of logs (the average); produce earn-

ings which are below the average transit rates on the railroads in the Southern territory applicable during the period involved to such transportation by 20.8% (Perrin's exhibit 54b). When compared with the earnings per car under the lowest transit rates on railroads in the Southern territory applicable to such transportation during said period they were 12.3% lower. (Exhibit 54b).

"The rates used by the Master are lower than the corresponding rates in use during the period involved for intrastate transportation in Virginia by 11.1%; in North Carolina by 1.3%; in South Carolina by 11.7%; in Georgia by 2.2%, and in Alabama by 13.4%. When compared with the Class P rates prescribed by the Florida Commission they are lower by 17.3%. (Exhibit 60b).

"The rates used by the Master when applied to a car of logs of the average weight of 56,471 pounds would have produced earnings 14.4% less than a like car contemporaneously moving the same distance over the Seaboard Air Line in Florida; that is, when the weight of the logs is calculated on the basis of ten pounds to the foot; and when the weight is calculated on the basis of eleven (11) pounds to the foot, the rates used by the Master would produce 5.8% less revenue than from a like car contemporaneously moving over the Seaboard Air Line (Exhibit 28b); 16.6% less than from a like car contemporaneously moving over the Southern Railway in Florida (Exhibit 60b); and 17.3% less than from a like car moving contemporaneously over the Florida East Coast Railway in Florida (Exhibit 29b).

(3) "And for that the Interstate Commerce Commission has found that higher rates should apply on traffic

in the Florida peninsular south of the line of the Seaboard Air Line from River Junction to Jacksonville than in other parts of the south; and this finding has been made in a number of cases," some of which were cited.

Appellant excepted to the second report of the Master on the further ground that it did not give force or effect to the findings of the Interstate Commerce Commission in its second report in this matter made on the 5th day of July, 1932, (186. I.C.C. 157-189) (R. Vol. I, p. 277 and Exhibits p. 171); which reaffirmed its previous findings of August 2, 1928, (146 I.C. 157) (O.R. Vol. I, p. 163); nor to its third report dated January 9, 1933, (190 I.C.C. 588) (Exhibits, p. 158). See Record Vol. I, page 277. This was true notwithstanding that all of the claimants were either direct parties to the proceedings before the Interstate Commission or were represented therein by the Railroad Commissioners of Florida. (Exceptions 4 and 10, R. Vol. I, p. 237 and Vol. I, p. 289).

Opinion of the District Court of January 22, (Filed Jan. 26), 1934, On Which Final Decree Is Based.

The opinion of the District Court dated January 22nd and filed January 26, 1934, was signed by Mr. Circuit Judge Sibley and Mr. District Judge Barrett. Mr. District Judge Underwood dissented therefrom. (R. Vol. I, p. 349).

The opinion shows that Mr. Circuit Judge Sibley and Mr. District Judge Barret disagreed as to the meaning of the condition in the order of re-reference to the Master, which has been heretofore mentioned and as to whether or not the claimants had made such an election of remedies as pre-

cluded them from proceeding in this case. The opinion recites:

> "In view of this disagreement we can not decide the point." (R. Vol. I, p. 350).

That opinion will be dealt with in the argument hereinafter contained and will not be further dealt with here. A copy of the opinion is made a part hereof as Appendix No. 1.

Motion and Amended Motion By Atlantic Coast Line Rd. Co. As to the Opinion of the District Court.

The decree on the aforementioned opinion was filed April 17, 1934. (R. Vol. I, p. 383). Prior to the filing of that decree and on March 30, 1934, the Atlantic Coast Line Railroad Company filed its motion for a modification of the court's opinion of January 22 (filed January 26), 1934, and therein claimed, amongst other things, that the record in this cause as it then stood, did not justify a decree in accordance with said opinion. (R. Vol. I, p. 355).

Later and on April 14, 1934, before the filing of the decree appealed from in this cause, the aforementioned motion was amended by the Atlantic Coast Line Railroad Company, by setting up the opinion of this Court rendered April 2, 1934, in *State of Florida, et al. v. United States, et al* (292 U.S. 1), and praying that the District Court withdraw its opinion of January 22 (filed January 26), 1934, for the reason that it was not consistent with the said opinion of this Court. (R. Vol. I, p. 360). This motion and the amendment thereto will be discussed in the argument hereinafter set out.

IV.

ASSIGNMENTS OF ERROR

APPELLANT RELIES UPON EACH OF ITS ASSIGNMENTS OF ERROR, WHICH ARE AS FOLLOWS (R. Vol. I, p. 390):

The District Court erred:

1. In entering its final decree of April 17, 1934, and therein decreeing the payment by appellant to the various appellees of the several amounts of restitution as therein set out and aggregating in total the amount of approximately $136,000, which decree was entered after the decree of the District Court, refusing to enjoin the orders of the Interstate Commerce Commission in Docket 18364, had been affirmed by the Supreme Court of the United States in its opinion of April 2, 1934, in *Florida v. United States, et al;* and which restitution was based on the fact that Atlantic Coast Line Railroad Company had charged to and collected from said several appellees, for the transportation of logs intrastate in Florida, during the period February 8, 1929—April 10, 1931, the rates prescribed by the Interstate Commerce Commission by its order of August 2, 1928, in said Docket 18364, as necessary to remove a burden on interstate commerce.

2. In entering its decree of March 7, 1931, and therein construing the mandate of the Supreme Court of the United States, entered pursuant to its opinion of January 5, 1931, in this case, as requiring the holding by the lower court, and in holding that the order of the Interstate Commerce Commission, dated August 2, 1928, entered in Docket 18364, and

prescribing rates for the intrastate transportation by appellant of logs in Florida, was null and void.

3. In failing to hold in its decree of March 7, 1931, as requested by appellant in its response, as amended, to the motions for restitution filed by appellees in the lower court after the said opinion of January 5, 1931, in this case, that the Supreme Court of the United States had not by its said opinion, nor by its mandates, held void the said August 2, 1928, order of the Interstate Commerce Commission but had, as shown by its said opinion, set aside the said order for want of findings, with the statement that the Commission "is still at liberty, acting in accordance with the authority conferred by the statute, to make such determination as the situation may require," thereby showing that the Supreme Court had deferred its ultimate determination of the validity of said order until such findings had been made by the Commission.

4. In failing to hold in its decree of March 7, 1931, that all action by the District Court on the motions for restitution filed in this case should be deferred until the Interstate Commerce Commission had completed its consideration of its said Docket 18364 (that is the cause in which the Commission's orders involved in this cause were issued), motions for the reopening of which, filed in March, 1931, were granted by said Commission on April 6, 1931.

5. In failing to hold that it was without jurisdiction to order the restitution prayed for by the appellees.

6. In entering its decree of July 31, 1931, wherein, with knowledge that the Interstate Commerce Commission had reopened the proceedings in its Docket 18364, the District Court held that it had jurisdiction, prior to action by said Interstate

Commerce Commission in said proceedings, to award restitution against appellant because of the fact that appellant had during the period from February 8, 1929, to March 7, 1931, or shortly thereafter, charged and collected from the appellees the rates prescribed by the Interstate Commerce Commission in its said Docket 18364 for the intrastate transportation of logs in Florida over appellant's lines for distances up to 170 miles.

7. For that, with knowledge that the Interstate Commerce Commission had reopened the proceedings before it in its Docket 18364, the District Court by its decree of July 31, 1931, referred the cause to a special master "to ascertain and report to this court the sums severally due to the complainants or other persons represented by the Florida Railroad Commission in this suit by the Atlantic Coast Line Railroad Company as overcharges exacted between said dates by virtue of said invalid order of the Interstate Commerce Commission, as measured by the difference between the amount collected and the established lawful rate in force at the time each shipment was made as the Master may find it to have been."

8. In entering its decree of March 16, 1932, entered March 18, 1932, and therein reaffirming its holding theretofore made that the order of the Interstate Commerce Commission entered August 2, 1928, in said Docket 18364, "is void and can itself give the Atlantic Coast Line Railroad Company no aid or protection" against the claims for restitution made against it.

9. For that the appellees asserted that the "established lawful rate in force at the time each shipment was made" as referred to in the court's order of reference of July 31, 1931,

was the Cummer scale and they presented their case on that basis. The Master found the Cummer scale of rates was unjust, unreasonable, and confiscatory and was not the lawfully established rate. The District Court, by its decree of January 30, 1933, without motion from appellees, re-referred the case to the Master notwithstanding the rights and position which this appellant had thereby acquired; and this was done notwithstanding the fact that the Interstate Commerce Commission had previously thereto issued its two reports on the reopened hearing before it in which it found that the rates established by it in its first order of August 2, 1928, were reasonable and just rates and the rates which should be used in order to remove unjust discrimination against interstate commerce; and also notwithstanding the fact that the Cummer scale had been previously held by the District Court in its conclusions of law and findings of fact filed with said order, to be confiscatory.

10. In holding in its decree of January 30, 1933, that the Florida shippers, appellees here, were or might be entitled to restitution on the basis of some "common law standard of reasonableness as fixed by the court," and in referring the matter again to the Master with direction that he ascertain "whether the charge made by the carrier in each instance was a reasonable one as measured by common law standard, and if not what was the reasonable charge to be made"; the said "charge made by the carrier in each instance being that prescribed by the Interstate Commerce Commission in Docket 18364, by its order of August 2, 1928, and, after reopening, of July 5, 1932, and January 9, 1933; of all of which said orders of the Interstate Commerce Commission the court was advised in this proceeding prior to the entry of this decree."

11. For that the District Court overruled the motion of appellant filed on March 7, 1933, and denied each and all of the prayers thereof which included the prayer that the reference to the Master be revoked and that decree be entered holding that the Atlantic Coast Line was not liable to claimants in any sum whatsoever; and if that was not granted, that the proceedings be deferred until claimants should have submitted their claims to the Interstate Commerce Commission for the ascertainment of whether or not there were overcharges for the period involved and if so the extent thereof; that if those prayers were denied, that the reference be broadened so as to procure such an adjudication as would justly and finally settle the accounts between the claimants and the Atlantic Coast Line as to both periods involved. That is, the period from February 8, 1929, to March, 1931, and from March, 1931, until February 25, 1933, when the second and third orders of the Interstate Commerce Commission went into effect.

12. In entering its decree of March 20, 1933, (which decree was entered after the District Court had, by its decree of February 24, 1933, refused to enjoin the orders of the Interstate Commerce Commission in Docket 18364 dated July 6, 1932, and January 9, 1933, which orders were subsequently, on April 2, 1934, upheld by the Supreme Court, and also after the District Court had held the Cummer scale of rates confiscatory), and in thereby refusing to direct the Master to consider and report the amounts due to Atlantic Coast Line Railroad Company by the appellees, parties to this proceeding, for the transportation of logs for them, intrastate in Florida, by said railroad company during the period March 7, 1931—February 25, 1933, when said railroad

company collected for such intrastate transportation of logs only the Cummer scale of rates, but with notice to all shippers that said railroad company would, after the Commission had concluded its investigation in said Docket 18364, make demand for further amounts on account of such transportation.

13. In not holding that the appellees had elected not to comply with the equitable condition placed upon them by the District Court in its order of re-reference entered by a majority of the court and filed January 30, 1933, and that because of such election appellees were not entitled to proceed with the re-reference; said condition contained in said order being as follows:

> "It is ordered that the exceptions be overruled and the report confirmed so far as it has gone and except as modified by the conclusions of law and fact filed herewith. Under the special circumstances of this case, we adjudge that the claimants for restitution should have the same only upon condition that they submit to an investigation of the true rights of the carrier to collect for the transportation of their logs during the period covered by the restitution and submit to such an adjudication as will justly and finally settle the accounts between such claimants and the carrier."

14. In entering its decree of April 17, 1934, and thereby decreeing restitution against appellant, although one of the three judges dissented and the other two were unable to agree as to whether the appellees had complied with the condition imposed on them by the District Court, by its decree of January 30, 1933, as the condition precedent to their right to recover anything against appellant.

15. In disregarding, in not hearing argument on, and in not granting the motion filed by appellant on March 30, 1934;

and likewise in disregarding, in not hearing argument on, and in not granting the amended motion filed in this cause by appellant on April 14, 1934, which said motions alleged that the Supreme Court of the United States, by its opinion of April 2, 1934, in *Florida v. United States*, (292 U.S. 1) had held that the findings made by the Interstate Commerce Commission in its July 5, 1932 report (186 I.C.C. 157) in Docket 18364, were sufficient and amply sustained by the evidence and supplied what had theretofore been found to be lacking in the 1928 report of the Interstate Commerce Commission; and in failing to hold that there should be no restitution awarded against appellant as claimed by appellees in the motions filed by them in these proceedings.

16. For that its findings of fact did not justify and do not sustain the decree appealed from.

17. For that the pleadings of the appellees did not justify or sustain the decree appealed from.

V.

ARGUMENT

SUMMARY OF THE ARGUMENT.

POINT A (Page 55)

The District Court should have enjoined the Florida Railroad Commission from putting into effect the Cummer scale of rates, and should have preserved the status, because:

(1) This Court's first opinion (282 U.S. 194), did not make a finality of the cause.

(2) Motions to re-open the cause (Docket No. 18364), were pending before the Interstate Commerce Commission.

(3) The Cummer scale had been found to be unreasonably low, non-compensatory and confiscatory by the Interstate Commerce Commission and the District Court in every previous consideration of the cause.

(4) The Florida log shippers were seeking equity and must necessarily do equity.

(5 and 6) The jurisdiction of the District Court to grant restitution is a power inherent in a court of equity and does not arise from a statutory grant.

(7) The imposition of conditions to the granting of restitution by the District Court was a proper exercise of equity power.

POINT B (Page 64)

The District Court should have given complete relief to all parties and broadened the re-reference to the Master so as to permit collection by appellant of the undercharges arising from shipments made during the second period when the Cummer scale was again put into use—April 10, 1931, to February 25, 1933.

POINT C (Page 68)

The Complainants for restitution based their claims on the fact that the Cummer scale of rates was the legal and lawful rate, and, this scale having been consistently found unreasonably low and confiscatory, they have elected their remedy and are not entitled to a decree on a different theory from that presented by their pleadings and evidence.

(1) The conditions attached to the relief granted by the District Court have not been met.

(2) The decree of the District Court (dated January 26, 1934), is not a decision by the majority of a statutory three-judge court insofar as it decides this issue.

POINT D (Page 77)

Restitution is not a matter of legal right but one of grace to be denied or granted by a court in the exercise of a sound judicial discretion.

POINT E (Page 84)

The establishment of the Cummer scale of rates was without the jurisdiction of the Florida Commission in that it was an unjust, unreasonable and confiscatory scale of rates, and, a carrier, on proof of this, can not be penalized for its violation.

(1) The enforcement of such a scale of rates, the carrier resisting, will violate the constitutional rights of the carrier.

POINT F (Page 91)

The Cummer scale of rates was not in force during practically all of the restitution period (February 8, 1929, to April 10, 1931), regardless of its justness, reasonableness, compensatory character or otherwise, because:

(1) This scale was suspended by an injunctive order of the Circuit Court of Appeals for the Fifth Circuit dated February 14, 1929.

(2) This scale was suspended by orders of the Florida Railroad Commission (Order No. 979, dated and effective January 30, 1929, and Order No. 990, dated and effective April 20, 1929).

POINT G (Page 101)

Complainants' reliance on *Baltimore & Ohio vs. U. S.*, 279 U.S. 871 (1929), is not justified by that record. Restitution in that case was the mere requirement that a liquidated and

certain payment of money erroneously ordered by the lower court be repaid. No scale of rates was involved.

POINT H (Page 104)

The burden of proof was on complainants, not only to show that the carrier had *exceeded* its rights in charging the scale of rates prescribed by the Interstate Commerce Commission but also to show the *extent*, if any, of such excess; the presumption of good faith, integrity and correctness was with the carrier. No effort was made to carry this burden and complainants' contentions ignored it.

(1) The carrier had the right to charge for its transporation service the highest reasonable rate.

POINT I (Page 110)

The method used by the Master and the District Court to measure restitution—the rate or scale for its yardstick—did not take into consideration the element of discrimination against interstate commerce.

POINT J (Page 118)

The District Court's present findings are inconsistent with its previous findings—Comparison of Opinions of January 26, 1934, and January 17, 1929, (30 Fed. 2nd. 116-121).

CROSS-APPEAL (Page 120)

POINT A (Page 120)

(1) The Cummer scale of rates was originally promulgated as a train-load rate. However, even the Florida Railroad Commission refused to allow its use except as a car-load rate.

CONCLUSION (Page 125)

THE DISTRICT COURT ERRED IN DENYING, BY ITS DECREE OF JULY 31, 1931, (R. VOL. I, p. 65), APPELLANT'S MOTION CONTAINED IN ITS RESPONSE FILED MARCH 7, 1931, AS LATER AMENDED (R. VOL. I, pp. 27, 56, 60), AND IN REFUSING TO ENJOIN THE FLORIDA COMMISSION FROM PUTTING INTO EFFECT THE INTRASTATE SCALE OF RATES KNOWN AS THE CUMMER SCALE.

The prayers of the appellant in its aforementioned motion and amendment thereto have been heretofore set out (pp. 13 et seq. hereof). They included the prayer that the court enter

> "such order or orders and proceedings be had and entered as will adequately preserve the status while this court proceeds through its proper process to determine, in conformity with the opinion and decree of the Supreme Court, that which is right and just to the parties and to this respondent, and that upon the ascertainment of that which is right and just to be done this court enter its order or orders and decree or decrees accordingly;
>
> "That it be (then) determined that the Cummer scale of rates is unjust, unreasonable and confiscatory and the application of it over the Atlantic Coast Line be permanently enjoined; and
>
> "That it be determined that the Cummer scale of rates was not in force at any time as to the traffic here involved on or after the 8th day of February, 1929." (R. Vol. I, pp. 42-43).

It also prayed that the court

"withhold action upon the prayer for restitution made by appellants in their original motion until the Interstate Commerce Commission shall have acted upon one or both of the two petitions or motions which have been filed with it in this matter, and which are referred to in its original response, and that it withhold action while the said Commission, which the Supreme Court in its opinion in this cause declared 'is still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require,' proceeds to exercise that liberty and to make the determinations which this situation does require.

"That this court restrain the Florida Railroad Commission, their officers and agents and attorneys, from further proceeding to enforce the scale of rates known as the Cummer scale of rates or to put the same into effect, and that upon final hearing the Cummer scale of rates be enjoined, held to be unjust and unreasonable, less than compensatory, and confiscatory; and that they be annulled; * * *

"That such temporary restraining order as may be necessary, proper or appropriate, to carry into effect the prayers of the original response and this amendment be entered, and that upon the final hearing upon this response and the amendment thereto the said restraining order be made permanent, and injunction issue enjoining and annulling the aforementioned scale of rates known as the Cummer scale of rates"; etc. (R. Vol. I, p. 58).

THE STATUS SHOULD HAVE BEEN PRESERVED AND THE ENFORCEMENT OF THE CUMMER SCALE OF RATES ENJOINED BY THE DISTRICT COURT ON THE ENTERING OF THE MANDATE OF THIS COURT FOR THE FOLLOWING REASONS:

(1) THE SUPREME COURT'S FIRST OPINION DID NOT MAKE A FINALITY OF THE CAUSE.

It was been pointed out that the Supreme Court in its first opinion (282 U.S. 194) had declared that:

> "The Interstate Commission is still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require";

and when it remanded the cases to the District Court, the mandates commanded:

> That "such further proceedings be had in said cause in conformity with the opinion and decree of this court *as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.*" (Italics added.)

It was intended by that opinion and the mandates issued thereon that the parties thereto had the right to move the Interstate Commission to reopen the proceedings in its docket 18364 to the end that it might make the intermediate findings of fact which this court had determined were necessary to sustain its final conclusion that the Cummer scale of rates was void because it worked unjust discrimination against interstate commerce.

(2) MOTIONS WERE PENDING BEFORE THE INTERSTATE COMMISSION TO REOPEN THE PROCEEDINGS BEFORE IT.

In pursuance of the contents of the opinion of the Supreme Court referred to, the Atlantic Coast Line Railroad Company and the Georgia Public Service Commission had applied to the Interstate Commerce Commission to reopen the case and to make the necessary intermediate findings of fact. Those motions were filed on March 5, 1931.

(3) THE INTERSTATE COMMERCE COMMISSION HAD FOUND IN ITS FIRST REPORT (146 I.C.C. 717, 724) THAT:

> "It is manifest, we believe, that the intrastate rates assailed (Cummer scale) which on the average are less than half of the proposed interstate rates, are less than reasonably compensatory"; etc. (O.R. Vol. I, p. 25).

The District Court on March 22, 1929, in the case of *State of Florida et al v. United States, et al* (31 Fed. (2d) 580, 582), had found that:

> "There was in evidence, also, comparisons of the attacked rate with rates on similar logs of other railroads in Florida and in adjacent states, and on other articles, such as sand, gravel, brick, lime, and cement, which, like logs, are shipped in large lots, loaded and unloaded by patrons, and expose the carrier to little risk or loss. There was further comparison with interstate rates established by the Commission itself for this same railroad and in this same territory. All these rates were shown to be from twice to thrice the attacked log rate. On the face of things the log rate is too low, and likely to burden the carrier."

When the court failed to enter an order preserving the status, it thereby required the Atlantic Coast Line to use for about two years rates which the Interstate Commission had determined to be confiscatory and which the court itself had determined to be less than reasonable. This will be discussed more fully hereinafter.

(4) THE COMPLAINANTS WERE SEEKING EQUITY AND WERE UNDER OBLIGATION TO DO EQUITY.

The District Court found in its opinion filed on January 30, 1933, in this cause, as follows:

> "Assuredly in a court of equity those who seek relief must do equity and accord to others their just rights." (R. Vol. I, p. 167).

This old principle is stated with great clarity in *Story's "Equity Jurisprudence," Vol.* 1, §72, as follows:

> " 'He who would have equity must do equity and give effect to all equitable rights in the other party respecting the subject-matter of the suit,' means that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he had acknowledged and conceded, or will admit and provide for, all the equitable rights, claims and demands justly belonging to the adversary party, and growing out of, or necessarily involved in, the subject-matter of the controversy. It says in effect, that the court will give the plaintiff the relief to which he is entitled only upon condition that he has given, or consents to give, the defendant such corresponding rights as he also may be entitled to in respect of the subject-matter of the suit.

> Anyone going into a court of equity, and asking its aid, whether that aid be such as could be obtained in a court of law, or whether it be of a character obtainable only in a court of equity, submits himself to the jurisdiction of the court, and in asking its aid, subjects himself to the imposition of such terms as well established equitable principles would require. Especially would this be true where the relief sought by the party applying to the court is both legal and equitable in its nature."

See also *Pomeroy's Equity Jurisprudence*, 4th Ed., Vol. 1, §386, p. 718:

> "According to its true meaning, therefore, the terms imposed upon the plaintiff, as the condition of his obtaining the relief, must consist of the awarding or securing to the defendant something to which he is justly entitled by the principles and doctrines of equity, although not perhaps by those of the common law—something over which he has a distinctive equitable right."

The court denied appellants' prayer for the preservation of the status and the restraining of the enforcement of the Cummer scale of rates in its order filed July 31, 1931, on the theory that

> "This specially constituted statutory court is without jurisdiction to enjoin rates established by the State of Florida for intrastate traffic, or to revise or amend the same." (R. Vol. I, p. 65).

It is respectfully submitted that the court was mistaken as to its jurisdiction.

(5) JURISDICTION OF THE COURT AS TO RESTITUTION.

The District Courts are given jurisdiction

"of cases brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission." *U.S.C.A., Title* 28, §41, *sub* §28.

There is no statute specifically vesting in the District Courts the right to grant restitutions in such cases.

The power which the court exercised, if any it had, was an equitable one inherent in every court of justice so long as it retains control of the subject-matter and of the parties. See *Arkadelphia Co. v. St. Louis, Southwestern Rwy. Co.*, 249 U.S. 134, 145-146.

It was also a power which related back to the mandate issued out of this court in this cause, the material provisions of which we have heretofore quoted (p. 9 hereof). In connection with the power arising from this mandate see *Arkadelphia Co. v. St. Louis, Southwestern Rwy. Co., supra*, p. 143.

The directions contained in a mandate from this court to the District Court become a part of the law to be administered in the subsequent progress of that case. See *City of Louisville v. Cumberland Tel. and Tel. Co.*, 225 U.S. 430 *In re: Louisville*, 231 U.S. 639, 645; *City of Louisville v. Cumberland Tel. and Tel. Co.*, 231 U.S. 652.

(6) A Proceeding for Restitution Is in Equity.

Baltimore & Ohio Rd. Co. v. United States, 279 U.S. 781, 785. The Baltimore and Ohio case was a restitution proceeding in which the lower court had dismissed a suit brought to enjoin an order of the Interstate Commerce Commission seeking divisions between certain railroads. The I.C.C.'s order went into effect and divisions were made thereunder.

This court reversed that decree and by its mandate directed that

> "such further proceedings be had in the case as according to right and justice and the laws of the United States ought to be had." (279 U.S. 783.)

This court held that:

> "The jurisdiction of the court (District Court) so constituted (three judges sitting) necessarily includes power to make all orders required to carry on such suits and to enforce the rights and obligations of the parties that arise in the litigation."

In all the above cases the basis was fixed. In none did the court itself undertake to determine the rate on which restitution should be based.

The complainants in the cases now under review made their claims to restitution in a case which was in equity. They elected not to proceed at law, but in equity.

(7) The District Court Had the Right to Impose Conditions Upon the Claimants as a Prerequisite to Entertaining Their Motions for Restitution.

The District Court in its opinion filed in this case on January 30, 1933, as we have heretofore pointed out, held that:

> "Assuredly in a court of equity those who seek relief must do equity and accord to others their just rights." (pp. 27-59 hereof; R. Vol. I, p. 167).

The court then imposed a condition upon the claimants as a prerequisite to the granting of their motions for restitutions. This will be more fully discussed hereinafter in deal-

ing more thoroughly with the nature of restitution. (p. 77 hereof.)

The Cummer scale of rates, as we have pointed out, had been found by the Interstate Commission to be less than compensatory. The evidence on which that finding was made by the Commission was before the court. The Master found that the Cummer scale of rates was confiscatory. The court united in approving that finding. To have granted the claimants the right to seek restitution without requiring them to withhold the exaction from the Atlantic Coast Line of the charge for future services to be rendered pending the disposition of the case appears to us in the particular circumstances of this cause to have been quite out of line. Especially is this so because the Railroad Commissioners of Florida were parties litigant in this cause constantly asserting that the Cummer scale of rates was just and reasonable, and non-discriminatory against interstate commerce.

To send the appellant back to the Florida Commission on this subject would be as though we had left the Coast Line's right to be determined by an adverse party litigant.

The denial by the District Court of the prayer for the preservation of the status had the effect of putting into operation rates which have been held to be confiscatory by every authority which has considered them.

The District Court evidently thought its power as a specially constituted court was less than its power in this respect than a District Court ordinarily organized; and it evidently thought of its power being limited by statute. Both of these ideas, we respectfully submit, are incorrect.

When the Urgent Deficiencies Act conferred upon the District Courts the jurisdiction which had been previously exercised by the Commerce Court it did not take from the District Courts the powers which they already had. Note *U.S.C.A. Title* 28, §41, *sub*§27, *Cumulative Supplement.* The power which the court was called on to exercise was not, as we have pointed out, a statutory power, but was, as this court has said, an inherent power or ancillary power aided by the mandate sent down from this court. See *United Motor Service Co. v. Traffic-Aire*, 57 Fed. (2d) 479, 485; *Ex parte Lincoln Gas & Elec. Co.*, 256 U.S. 512, 516.

The Supreme Court has

> "the right to issue any writ which may be necessary to render our (its) appellate jurisdiction effectual." *Ex parte Milwaukee Rd.*, 5 *Wallace* 188, 190.

The Court Erred in Refusing to Give Relief to Appellant on Account of Shipments Made During the Period Following the Restitution Period.

This question arose in the following circumstances:

The mandate from this court had been entered on March 7, 1931. On July 31, 1931, the District Court had sent the claimants' motions for restitution and the responses thereto to the Master and had declined, as we have seen, to preserve the status. The Master had filed his first report on November 14th, 1932, holding the Cummer scale of rates to be confiscatory.

On January 30, 1933, the District Court handed down its opinion and order re-referring the matter to the Master with

directions to find whether the charges made by the Atlantic Coast Line during the restitution period were lawful, and if not, what were the reasonable charges.

On March 15th, 1933, the Atlantic Coast Line filed its petition with the District Court (R. Vol. I, p. 173), setting up the fact that after the entry of the mandate and after the refusal of the court to preserve the status, it ceased charging for the transportation of logs intrastate in Florida, rates based on the scale fixed by the Interstate Commerce Commission and returned to the Cummer scale of rates; that upon returning to the Cummer scale of rates, in the circumstances aforementioned, it gave notice to all shippers and consignees of the logs affected by this proceeding, including therein all the claimants who were then asserting the right to restitution against the Coast Line and who are parties to this appellate proceeding, to the effect that until further notice it would charge for the transportation of logs over its lines in Florida the Cummer scale of rates, but asserted that if the Cummer scale of rates "is not the applicable rate or rates now in effect, the Atlantic Coast Line Railroad Company will later make demand for revenue based on the applicable rates." (R. Vol. I, p. 177). This notice is fully set out at page 29 hereof.

In its said petition to the District Court, appellant alleged that all the shipments of logs made for the claimants after the Cummer scale of rates was thus restored were made under the aforementioned protest and notice.

The Cummer scale of rates had then again been determined by the Interstate Commission in its report of July 5, 1932, to be confiscatory. (186 I.C.C. 157; Exhibits, p. 171). That proceeding had again been reopened before the Commission,

further evidence taken and the Commission made its third report on January 9, 1933, (190 I.C.C. 588). In this third report the Commission had adhered to its previous findings and orders. The District Court had prior thereto by its order of February 24, 1933, refused to enjoin the operation of the Commission's said reports and orders thereon. All of the evidence which was before the Commission and all of the Commission's orders were then before the Court in the proceedings had before it.

The Atlantic Coast Line sought to have the order of reference to the Master broadened so as to have him determine in this cause how much the Atlantic Coast Line had suffered during the second period; that is, the period after the Cummer scale of rates had been put back into effect in the circumstances above described. That period was approximately from April 10, 1931, to February 25, 1933. The District Court declined to entertain appellant's said petition on the ground that:

> "We have no general jurisdiction to adjust accounts between the carrier involved and its patrons." (R. Vol. I, p. 187).

After stating that the court had sustained its jurisdiction to make restitution because of its erroneous order, the court stated:

> "and this alone, under the equitable conditions imposed, is now before the Master. We do not feel justified in enlarging the jurisdiction beyond the scope set forth in the previous order of reference." (R. Vol. I, p. 187).

It is respectfully submitted that the court should have done complete equity. Clearly the Cummer scale of rates which the Coast Line was required to charge during this

second period of practically two years was confiscatory. There is no difference between the court and the Commission as to that.

The plain, unalterable fact is that the Atlantic Coast Line, during the nearly two years which passed while the Commission and the court were considering this re-opened case, was required to carry logs at rates which had been condemned both by the court and the Commission as being confiscatory.

The Coast Line must, therefore, either lose the amounts involved or it must go into another jurisdiction to have the question passed upon. If the decree appealed from stands, the Coast Line must pay out large sums of money to the claimants while in every equitable sense the same claimants owe to it at least a large part of those moneys on account of the transportation service rendered to them on the illegal Cummer scale of rates during the second period.

If the lower court's position is sustained the Coast Line will be required to pay money to persons who are indebted to it because of the transportation service rendered by it to them at the unlawful rates during the second period; or it must go into some other forum and undergo a long litigation over the same subject-matter which has been in issue now for more than eight years.

The District Court evidently looked upon its jurisdiction in too narrow a sense. It did not consider its jurisdiction as an inherent or ancillary one under which it was required to render complete equity between the parties.

> "Where a court of equity has obtained jurisdiction over some portion of a controversy, it may and will in general proceed to decide all the issues and award com-

plete relief even where the rights of parties are strictly legal and the final remedy granted is of the kind which might be conferred by a court of law."

Hartford Accident Co. v. Southern Pacific, 273 U.S. 202, 217-218;

1 *Pomeroy Equity Jurisprudence*, 4th Ed., Sec. 181, 321, especially the latter;

Harr et al v. Pioneer Mechanical Corporation, 65 Fed. (2d), 332-335 (C.C.A. 2d).

Equity Rule No. 30 permits a party to an equity suit, without cross bill, to

> "Set up any set-off or counter claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter claim so set up will have the same effect as a cross suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the cross claim."

It is respectfully submitted that the court in refusing to preserve the status while the Interstate Commission reconsidered the matter created confusion and brought about a different decision by the Commission on the one hand and by the court on the other; and left appellant exposed to inequitable circumstances, with which we have dealt.

Claimants Elected to Proceed Contrary to the Condition of Order of Re-reference.

The circumstances out of which this point grows are recited in the statement of the case, beginning with page 34 hereof.

In the motions for restitution filed by the claimants in this case their claims are based upon the assertion that the Cummer scale of rates was the lawful scale and that the measure of their claims for restitution, if they are entitled to any, should be the difference between the amounts charged by the Railroad under the Interstate Commission's scale and the amounts which would have been charged for the same transportation service under the Cummer scale; that is, regardless of whether the Cummer scale was reasonable or unreasonable; discriminatory or non-discriminatory; confiscatory or non-confiscatory.

In the first hearing before the Master on the first reference, counsel for the claimants said:

> "I take it that" counsel for the Railroad Company, "among other things, is going to try to prove the reasonableness of this rate or the unreasonableness as the case may be, of this lawfully made state rate, and we are going to vigorously and vociferously, in regard to that kind of thing object to it." (R. Vol. I, p. 491).

Claimants' cases were pleaded solely upon the proposition that the Cummer scale of rates constituted the lawful measure of their damages. When the Railroad Company offered to prove that the Cummer scale of rates was not the lawful established rate in Florida during the times involved because the rates under the Cummer scale were unjust, unreasonable, and confiscatory, objections were made on the ground that neither the District Court nor the Master had authority to pass upon the question as to whether or not the Cummer scale of rates was reasonable or confiscatory.

The question was certified by the Master to the District Court (R. Vol. 1, p. 67), and the court rendered an opinion

in part as follows:

> "We are of opinion that if the Atlantic Coast Line Railroad Company, had, without intervening in this case and becoming a party to this litigation, made the charges it did and in a suit brought by the shippers in a state court to recover as for overcharges could under the law of Florida have defended its charges as it now proposes, it should have the same right in this proceeding." (R. Vol. I, p. 70).

It was determined by the Master that the Atlantic Coast Line had the right to show that the rates under the Cummer scale were unjust and unreasonable and were not the lawful established rates in Florida for the transportation of logs at the times the shipments moved. The Coast Line offered a great deal of evidence to prove that the rates under the Cummer scale were unjust, unreasonable and confiscatory, and the Master found, and the court affirmed the finding, that the Cummer scale of rates was confiscatory. (R. Vol. I, pp. 87, 92, 170).

In the exceptions filed to the Master's report the chief point made by the claimants was that the court had no right to determine whether the rates under the Cummer scale were just or unjust, reasonable or unreasonable, discriminatory or non-discriminatory and on the other hand the rates under the Cummer scale were the lawful rates in Florida. Those exceptions were overruled. (R. Vol. I, pp. 107, 122, 131, 161, 172).

This appellant was then, in ordinary course, entitled to a decree, based on the Master's report, adjudging that there was no liability against it in favor of the claimants or any of them on account of the restitutions claimed.

However, instead of rendering a decree for the Railroad Company—this appellant—the court made a re-reference of the case to the Master. This re-reference was upon the following condition:

> "Under the special circumstances of this case we adjudge that the claimants of restitution should have the same only upon condition that they submit to an investigation of the true rights of the carrier to collect for the transportation of their logs during the period covered by the restitution, and submit to such an adjudication as will justly and finally settle the accounts between such claimants and the carrier." (R. Vol. I, p. 172).

Thus the court gave to the claimants another trial to the end that it might be determined what were the lawful rates in Florida for the services rendered by the Railroad in transporting the logs on account of which the restitution is claimed.

It has been determined by the Master that the rates under the Cummer scale were not the lawful established rates and that finding had been affirmed by the District Court. It had also been determined by him that there was no lawful established rates covering this service, in effect during the restitution period and that finding had been affirmed by the District Court. Thereupon, the court, *upon the condition aforesaid*, gave to the claimants a further hearing in order to determine whether the rates fixed by the Interstate Commission and charged by this appellant should be the measure of their damages or whether the Master should determine that a different scale of rates was the lawful one.

Under this condition the claimants received a substantial benefit, for it had been determined by the Master and the

District Court that the rates under the Cummer scale could not be the lawful standard of measurement because they were unjust, unreasonable, and confiscatory. In order that the claimants might have that benefit which gave them an opportunity to avoid in whole or in part their defeat before the Master on the first hearing, the court by its re-reference granted them a second trial, but did this only *upon condition* that "*they submit to an investigation of the true rights of the carrier to collect for the transportation of their logs during the period covered by the restitution, and submit to such an adjudication as will justly and finally settle the accounts between such claimants and the carrier.*"

The court gave the claimants the benefit referred to, and exacted from them in return therefor that they do the equity of consenting to an investigation of the true rights of the carrier. The court did not mean to give them a second trial when they had lost the first one, without putting them under the obligation of doing complete equity. This required a complete accounting between the parties.

These circumstances required them to make an election. The doctrine of election is based upon the fundamental principle that "He who seeks equity must do equity." See Pomeroy's "*Equity Jurisprudence*," 4th Ed., Vol. 1, §461.

The claimants did not make that election. On the other hand they emphatically made the election against complying with the condition imposed by the court. (See pp. 34, et seq. hereof; R. Vol. II, pp. 738 et seq.).

The decree in this case was not by an united court. One of the Judges had dissented at the time of the making of the order of re-reference on the Master's first report; that is, in the opinion and order filed on January 30, 1933. (R. Vol. I,

pp. 159, 172). He dissented from the opinion on the re-reference filed January 26, 1934, (R. Vol. I, p. 354). That member of the court "was of opinion that restitution could not be accomplished and that the court should deny it." (R. Vol. I, p. 349).

One of the other two judges was of the opinion "that an abandonment of the Cummer scale of rates was also required."

This member of the court was of the opinion

> "* * * that restitution being not an absolute right but granted *ex gratia*, the affixing of a precedent condition to the grant of the right of ascertaining what, if any, restitution is recoverable based upon compensation for service on the basis of *quantum meruit*, * * * is fair and equitable." (R. Vol. I, p. 350).

The other member of the court who concurred in the opinion on the re-reference or second report of the Master was

> "of the opinion that the condition meant only that a result should be reached on full hearing of the merits of the claims, and should so adjudicate them that there should be no suits on them before other tribunals, but that there might be a full review of all rulings made in regard to the Cummer scale or otherwise." (R. Vol. I, p. 350).

If the condition meant no more than that, then the appellant, in our opinion, receiving nothing to counter-balance the benefit which was given to the claimants in the offer to them of the opportunity to have a second trial before the Master.

The first trial before the Master had proceeded for practically a year and there had been the fullest opportunity to the claimants for the introduction of all relevant evidence and

for all other rights which might have been exercised by a litigant in any court under the same circumstances. The construction of the condition made by the member of the court above referred to is based on the theory that such a hearing and trial and the judgment issuing out of it would not be binding and would in effect be of no value whatever.

We respectfully submit that this is without precedent and would render the long and tedious hearings, the preparations made therefor, and the judgment made on account thereof, completely nugatory.

THE MEANING OR CONSTRUCTION OF THE CONDITION COMES TO THIS COURT WITHOUT DECISION FROM THE DISTRICT COURT.

If that condition meant what we have contended it means, the claimants certainly had no right to proceed with the second hearing, for they made their election in the emphatic manner herein set out at the very beginning of the hearing on re-reference, with full knowledge of the condition and that election by them was binding and determined their course to proceed under the order of re-reference. That is, the claimants elected to take the benefit conferred upon them of a second hearing without giving effect to the equitable consideration exacted therefor.

DECREE SIGNED BY TWO JUDGES, WHO WERE NOT IN AGREEMENT AS TO MEANING OF CONDITION ABOVE REFERRED TO.

Two Judges signed the opinion and decree appealed from notwithstanding the division of opinion hereinbefore referred to. That position was reached on the theory that the meaning

of the condition "is immaterial in this court since all three Judges concur in the opinion that the Cummer scale is not available to measure restitution because it is confiscatory, and void as an enforced rate." (R. Vol. I, p. 350).

This seems to be a *non sequitur*, for the claimants had made their election and continued to claim, as they do in this appeal, that the yardstick by which their rights are to be measured was and is the Cummer scale of rates. They have received a benefit from that claim. That benefit they were not entitled to because they had not done the equity on which it was based.

The holding that the meaning of the condition had become immaterial is confined to "this court"; that is, the District Court. In other words, the immateriality of the meaning of the condition is applicable only in the District Court.

We submit that it is very inequitable to have the claimants come to this court undertaking to assert the fruits of a second hearing granted to them on the condition quoted, when they have not complied with that condition. That is, we contend that they should have done the equity of foregoing their claim that the Cummer scale of rates was and is the only yardstick by which to measure the rights. When the claimants made their election not to give up their contention that the Cummer scale was and is the only measure of their rights, the proceeding before the Master should have stopped; and the court should have entered a decree for this appellant on the first report.

The claimants are before this court claiming a money judgment against this appellant when the constituency of the court stood as follows as to the decree:

One of the judges was of the opinion that the court had no jurisdiction to proceed in this matter as a restitution case;

Another was of the opinion that under the condition referred to the claimants had no right to proceed under the terms of the order of re-reference; and

The third was of the opinion that the claimants did have the right to proceed in this case without complying with the conditions referred to, within the meaning we have given to it.

The Judge who was of the opinion that the condition required an abandonment of the Cummer scale as a measure of claimants' rights also thought that the claimants had the right of appeal from the decision of the court that the Cummer scale of rates was void.

If this right of appeal was to have been asserted by the claimants they should have elected not to go on with the second hearing before the Master; permitted a decree to have been entered on the first report; and taken their appeal from that.

As it is, the claimants come into this court asserting both that the Cummer scale of rates is the standard of their rights and that if that be wrong, then they have the right to fall back on the judgment which finds an amount intermediate that which would have been found under the Cummer scale and that which would have been found under the Interstate Commission's scale, as the yardstick by which to measure their rights.

It must be remembered that the claimants, as stated, had tried their case in the first hearing before the Master, upon the sole basis that the Cummer scale of rates was the measure of

their rights, and that had been determined by the court to be impossible because the Cummer scale of rates was confiscatory and not the lawful rate in Florida. Claimants were, therefore, properly, entirely out of court. Their position now is that the condition on which the rehearing was granted meant that they might still make the inequitable claim that the appellant should be adjudged to yield to a thoroughly inequitable and confiscatory standard of their rights, and in addition thereto that they might, while claiming that inequitable and confiscatory standard, undertake to assert a different standard.

RESTITUTION.

The right of restitution in these cases must be based upon equitable principles. The cases were brought in equity and they are still in equity.

The decision of this court in its first opinion (282 U.S. 194) did not undertake to make a finality of the cause. We have also pointed out that the subject-matter proceeded before the Commission on a rehearing; that the Commission made its second report on July 5, 1932, (186 I.C.C. 157; Exhibits, p. 171) in which it reaffirmed its previous finding to the effect that the Cummer scale of rates was less than compensatory; that bills were filed in the United States District Court and hearings were had thereon. A motion to again reopen the case before the Interstate Commission was filed by the claimants and granted; another hearing was had and the Interstate Commission adhered to its previous report. That report and order were entered on January 9, 1933. (190 I.C.C. 588; Exhibits, p. 158). Supplemental bills were filed by the claimants and these were heard by the District Court and on February 24,

1933, that court entered its decree refusing to restrain or enjoin the order of the Interstate Commission, (4 Fed. Supp. 477; Exhibits, p. 213); and the Commission's orders went into effect on February 25, 1933.

The effect of this was that the findings of fact made by the Commission in its report of August 2, 1928, (146 I.C.C. 717; O.R. Vol. I, p. 16), were reaffirmed and the rates prescribed therein were put into effect by order of the Commission which order was based upon extensive findings of fact including the unreasonableness of the Cummer scale of rates and that it worked unjust discrimination against interstate commerce.

The new evidence upon which the second report of the Master was based dealt with and covered the restitution period and the identical shipments on which restitution has been granted by the District Court. (See 186 I.C.C. 157, and especially pp. 165 et seq.; R. Exhibits, p. 179).

The report of the Master on the second hearing was made November 7, 1933, (R. Vol. I, p. 188). The opinion of the court overruling the exceptions thereto was filed January 26, 1934, (dated January 22), R. Vol. I, p. 349); and the decree thereon (here appealed from) was filed April 17, 1934. (R. Vol. I, p. 383).

At the time the Master made his second report the Interstate Commission had made its first findings and report of August 2, 1928; and had likewise made its second finding of July 5, 1932, (186 I.C.C. 157); and had likewise made its third finding of January 9, 1933, (190 I.C.C. 588). Bills had been filed to enjoin the said second order; the proceeding had been again reopened by the Commission, and after its third report (190 I.C.C. 588), supplemental bills had been filed

to restrain the last report of the Commission and they had been decided against the claimants. Before the entry of the decree here appealed from, which was filed April 17, 1934, this Court had made its decision on April 2, 1934, (292 U.S. 1) upholding the decree of the lower court which had declined to enjoin the Interstate Commission's last two orders. The Master's second report and decree following it differed very widely from the findings of the Commission and the action of the Court above described.

If the Master had followed either the findings made in the Commission's second report or the order thereon, there would have been no decree rendered against this appellant.

Restitution is not a matter of right. In 2 R.C.L. 292, under title of "Appeal and Error," §246, it is said:

> "Though a judgment has been reversed, its reversal may not be conclusive of the rights of the parties or necessarily establish that, as the final result of the litigation, the appellant will be entitled to retain the property or money which his adversary had taken possession of or collected before the reversal."

The same authority states that "restitution is not of mere right, but is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the cases does not call for it. And certainly there may be cases in which, notwithstanding the reversal, it so clearly appears that the party receiving moneys under a judgment is in equity and good conscience entitled to retain them, that the court is justified in altogether denying the restitution, whether sought by motion or by action."

In *State ex rel Hayden v. Horton*, 70 Neb. 334, 97 N.W. 434, headnotes 1, 2, and 3 read as follows:

"It is a general rule, that 'upon the reversal of a judgment which has been executed, it is the duty of the court to compel restitution,' but restitution is not in all cases a matter of absolute right. It rests in the sound discretion of the court.

"Ordinarily an order of restitution will not be made against a solvent party where the result will be to deprive him of an opportunity to be heard in the courts of this state as to the merits of his claim.

"A corporation neglected to issue stock to a subscriber therefor, and, by its proper officers, ordered the money which had been paid upon subscription returned to the subscriber. The subscriber procured a preemptory writ of mandamus, compelling subordinate officers of the corporation to execute papers deemed necessary to secure a return of the money. The order allowing the writ was afterwards reversed. The corporation having gone into bankruptcy, and the relator being solvent, it is held that the trustee in bankruptcy is not entitled to an order requiring the relator to return the money so obtained to the trustee in bankruptcy."

In *Teasdale v. Stroller,* 133 Mo. 645, 34 S.W. 873, the first headnote reads:

"Money voluntarily paid to satisfy a judgment which was subsequently reversed cannot be recovered back where it appears that the original claim was a just one and that the judgment was reversed for a mistake in procedure."

Quoting from Chase, C. J., in *Greene v. Stone, 1 HAR & J,* (Md.) 405, 408, the court said:

"The plaintiff cannot recover unless the defendants retained the money contrary to equity and right. The defendants may resort to any equitable or conscionable

defense to repel the claim of the plaintiff, and may show the justice of his original claim."

In *Hurst Automatic Switch & Signal Co. v. Trust Company of St. Louis County*, 291 Mo. 54, 236 S.W. 58, the 6th and 7th headnotes read as follows:

> "A proceeding after the reversal of a judgment to make restitution, whether by suit or motion in the case, is governed by broad equitable considerations, and it is a question *ex sequo et bono* as in suits for money or property had and received.
>
> "A court of equity, once in possession of the *res* and having jurisdiction of the parties, will not relinquish its hold until it has done complete and adequate justice to all the parties."

Claimants' Motions for Restitution Should Not Have Been Entertained By the Court.

At the time the claimants filed their motions for restitution this litigation was not ended. The Commission had made its first report and order. The order had been set aside in the circumstances which we have described and which left the matter open. The Commission was still at liberty to make additional findings of fact on the record before it, if that record justified them, or to reopen the case, take new evidence and make new findings. The case was reopened, and was pending at the time the motions for restitution were filed. The reopened case proceeded to a final conclusion before the Master made his second report and before the District Court rendered its final decree of restitution.

The Master's first report had held that the rates under the Cummer sale were unjust, unreasonable and confiscatory. The Interstate Commission's first report (August 2, 1928, 146 I.C.C. 717), had made practically the same finding of fact as to those rates. The Commission's second report (July 5, 1932, 186 I.C.C. 157), had reaffirmed the findings of its first report and with a great deal of detail had again made the finding that the Cummer scale was unjust, unreasonable and confiscatory.

Restitution not being a matter of mere right but resting in the exercise of sound discretion, the District Court should not have undertaken the consideration of it until the cause was completed, nor should it have rendered a decree allowing restitution to the claimants where the justice of the case did not call for it. See *Gould v. McFall*, 118 Pa. St. 455 (12 Atl. 336), and *San Francisco Ry. Co. v. Lawrence*, 30 Fed. (2d) 454.

The Lawrence case was appealed to this court. See 278 U.S. 228. At page 233 of that opinion the court said:

> "But it is clear that, upon final hearing, the Railway might prove that it was entitled to a permanent injunction; and the District Court was not obliged to order restitution meanwhile."

In the case at bar this appellant did establish upon final hearing that the second order of the Interstate Commission, fixing the same rates as were prescribed in the first order, was lawful and that it was supported by adequate findings of fact. We think that should have been conclusive of the case and that decree of restitution should not have been entered, for in the case of *Florida v. United States*, 292 U.S. 1, at p. 12, this court held:

"The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. *United States v. Louisville & N. R. Co.*, 235 U.S. 314, 320, 59 L. Ed. 245, 250, 35 S. Ct. 113. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U.S. 88, 100 and other cases cited) * * *.

"We agree with the conclusion of the District Court that there was no lack of substantial evidence to support the Commission's findings."

The Commission's second report (186 I.C.C. 157, 189; Exhibits, p. 171), found that the rates prescribed by it in its first hearing and again in its second hearing were the rates necessary to remove unjust discrimination against interstate commerce, and that rates "*not less than*" those so prescribed would be sufficient to remove that discrimination. The findings of fact by the Commission should have been considered to be controlling. Those were the rates which had in both reports of the Commission been found to be reasonable and just for interstate movements of logs from North Florida to Georgia and for intrastate movements of logs over the Atlantic Coast Line in Florida for distances not exceeding 170 miles.

The District Courts have no right to enjoin, set aside, annull or suspend, in whole or in part, any action of the Commission unless it be an affirmative order. *U.S.C.A., Title* 28, §41(28). The orders there referred to are only those which are affirmative. See *United States v. A. B. & C. Rd. Co.*, 282 U.S. 522; *Proctor & Gamble v. United States*, 225 U.S. 282;

> The "court in suit to set aside orders of the Interstate Commerce Commission had no power to review the Commission's findings."

See *Brady v. Interstate Commerce Commission*, 43 Fed. (2) 847. The decree of dismissal by the District Court was affirmed by this court. See *Brady v. I.C.C.*, 283 U.S. 804.

The Florida Commission Has No Jurisdiction to Prescribe an Unjust or Unreasonable Rate, and a Carrier Can Show That a Rate So Prescribed By Said Commission Is Unjust or Unreasonable, Or Confiscatory in Defense of Its Violation.

Claimants contend that the District Court was required to find that the rates under the Cummer scale were the hard and fast measure of their rights to restitution against this appellant, and that those rates should control despite the adjudications and findings that they were unjust, unreasonable and confiscatory.

Appellant claims that the District Court should not have undertaken to award restitution until the Interstate Commission had acted on this subject; and that no rates should be used as the measure of the claims for restitution in any event which are unjust, unreasonable or discriminatory against

interstate commerce; and that rates prescribed by the Florida Commission are beyond its jurisdiction if such rates are either unjust or unreasonable; and that orders of the Florida Commission are open to examination as to their justness or reasonableness of the rates prescribed therein; and that schedules evidencing rates prescribed by the Florida Commission are only prima facie evidence of the justness and reasonableness of such rates; and that if the Florida Commission should prescribe a schedule of rates and the carrier should disregard them, the carrier has the right to show in defense that the rates so prescribed are unjust or unreasonable or confiscatory, and are, therefore, void.

The Court below agreed to all of these positions except that the Interstate Commission had the primary jurisdiction.

§6703 *of the Compiled General Laws of Florida*, 1927, empowers the Florida Railroad Commissioners as follows:

> "It shall be the duty of said Commissioners:
>
> "(1) To make *reasonable and just* rates of freight and passenger tariffs to be observed by all railroads," etc. (Italics added.)

§6721 *of the Compiled General Laws of Florida*, 1927, provides that:

> "Said Commissioners shall make and furnish to each common carrier doing business in this State * * * a printed or written schedule of just and reasonable rates and charges for transportation of freight, passengers, etc. * * * and such schedule certified by the Chairman of the Commissioners, shall be admitted in evidence without necessity for other proof, and shall in all suits brought against any common carrier wherein is involved the rates of any common carrier * * * be deemed and

taken in all the courts of this State as *prima facie* evidence that the rates fixed in such schedule or schedules are just and reasonable rates of charge for the transportation of freight," etc. (Italics added.)

We thus see that by statutory provisions the Florida Railroad Commission's power to make rates is limited to those which are "reasonable and just" and that its schedules of rates are to be only "*prima facie evidence*" that the rates fixed in such schedule or schedules are just and reasonable.

The Supreme Court of Florida has held that the right to make only just and reasonable rates is a limitation upon the Commissioners' powers.

In State v. Atlantic Coast Line Rd. Co., 56 Fla. 617 (47 Sou. 969, 970 (1908), the Supreme Court of Florida held as follows:

> "The Railroad Commissioners are statutory officers whose powers are special and limited. They can exercise only such authority as is legally conferred by express provisions of law, or such as is by fair implication and intendment incident to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the purposes for which the offices were established."

That opinion proceeds to state that:

> "If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commissioners, the further exercise of the power should be arrested"; etc.

It is also held in that decision that:

> "The rules and regulations must operate within the expressed limitations of the statute, and their reason-

ableness must be subject to judicial determination as other similar matters are determined, without undue restrictions or discriminations."

The Supreme Court of Florida likewise held in *State v. Florida East Coast Ry. Co.*, 69 Fla. 165 (67 Sou. 906, 911) that:

> "The doctrine has been approved by this court many times that unreasonable regulations are not within the authority conferred by law upon the Railroad Commissioners, and, when it appears from the pleading or the evidence in a case that an order or regulation is unreasonable, or unjust with reference to all the substantial interests affected by it, or violative of constitutional provisions for the protection of private property rights, such regulations will not be enforced by the courts."

The court cites *Railroad Commissioners v. Louisville & N. R. Co.*, 62 Fla. 315 (57 Sou. 175); *Railroad Commissioners v. Florida East Coast Rd. Co.*, 64 Fla. 112 (59 Sou. 385).

Cullen v. Seaboard Air Line Rd., 63 Fla. 122 (58 Sou. 182), holds that in an action by a shipper against a carrier to recover overcharges

> "*applicable schedules of freight rates duly authenticated should be deemed and taken as prima facie evidence that such rates are reasonable, as authorized by the statute.*" (Italics added.)

The case of *LaFloridienne v. A.C.L. Rd. Co.*, 63 Fla., 208, 212 (58 Sou. 185), makes a like holding.

The District Court deals with this subject in this case in its opinion re-referring the case to the Master; that is, in its opinion filed January 30, 1933, (R. Vol. I, p. 167). The court there holds that rates of the carrier filed with the Florida

Commission or which may be prescribed by the Florida Commission are only prima facie evidence of the reasonableness and justness of the rates therein contained and that in this case the reasonableness and justness and legality of those rates may be inquired into.

As early as 1889 the Florida Supreme Court dealt with the rights of a carrier which had charged rates higher than those prescribed by the Florida Commission, and the court held that the carrier had the right in such proceedings to show that the rates which had been prescribed by the Commission were unreasonable. See *Pensacola & A. R. Co. v. State*, 25 Fla. 310 (5 Sou. 833). There the Florida Commission had prescribed certain rates for the transportation of passengers and freight. The defendant railroad company charged a passenger $1.25 for transporting him from one town to another within the State, whereas the rate prescribed by the Commission was 80 cents. The Florida Commission directed the Railroad Company to refund to the passenger the excess of 45 cents. The Railroad refused to obey that order of the Commission, and the State thereupon instituted action against the Railroad to recover a penalty of five thousand ($5,000) dollars provided by statute, for failure to comply with the order of the Commission.

The Railroad pleaded that the rate was confiscatory. The State demurred and the lower court sustained the demurrer. The Supreme Court of Florida reversed that.

The court set forth the Florida statutes applicable to the case (pages 834-35, 5 Sou.), which in all material respects are the same as those now in existence; and discussed the procedure which should be followed by the trial court. The court points out that the statute provides that all presumptions

shall be in favor of the validity of the Commissioners' action, and that:

> "Under the statute the burden will be upon the company to make out a prima facie case, sustaining its plea, before the State will be called upon to introduce any evidence, and, if this be done by the company, the State must then, through the instrumentality of its commissioners, and any other proper means, establish the justice of the action of the Commissioners in fixing the schedule of passenger and freight rates against the arraignment which the Company has made of them in its third plea." (5 Sou. pp. 843-844.)

The effect of this decision is that an order of the Florida Railroad Commission prescribing a schedule of rates which is unreasonably low imposes no obligation on a carrier to abide by it. It holds further that the carrier is under no obligation to comply with an order of the Florida Commission directing it to refund to a passenger or shipper the difference between the charges exacted and the charges that would have been exacted had the scheduled rate been followed.

In the case at bar the court below found not only that the prima facie presumption in favor of the Cummer scale of rates had been overcome but also that those rates had been proved to be confiscatory. Clearly the court had the right to make that finding and equally clearly the evidence on which it was made was overwhelming.

A State Has No Power to Require the Rendition of Any Transportation Service By a Common Carrier by Railroad at a Loss or Without Compensation That Is Reasonable and Just.

This statement is, of course, sustained by many authorities and has been long recognized as a rule of law.

In *Chicago, Milwaukee & St. Paul Rwy. Co. v. Public Utilities Co.*, 274 U.S. 344, at 350-351, the court considered a case involving rates for the transportation of logs, and held among other things:

> "The State has no power to require petitioners to haul the logs at a loss or without compensation that is reasonable and just, even if they did receive adequate revenues from the intrastate haul, and the interstate lumber haul taken together."

Other cases very much in point are *Banton v. Belt Line Rwy. Corp.*, 268 U.S. 413, 421; *Brooks-Scanlon Corp. v. Railroad Commission of Louisiana*, 251 U.S. 396. A paragraph from the last mentioned decision is as follows:

> "We are of the opinion that the test applied was wrong under the decisions of this court. A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage."

See also *Northern Pacific Railway v. North Dakota*, 236 U.S. 585; *Bluefield Co. v. Public Service Com.*, 262 U.S. 679, 692-695.

Regardless of Whether the Cummer Scale Was Just or Unjust, During Practically All of the Restitution Period It Was Not in Effect.

This subject divides itself into two parts:

(a) On February 14, 1929, the Circuit Court of Appeals for the Fifth Circuit restrained the enforcement of the Cummer scale of rates and this remained in effect until the 30th day of March, 1931, which was after the movement of logs during the restitution period had either actually or practically stopped. (R. Vol. I, p. 496).

(b) The Cummer scale of rates was suspended by the Florida Commissioners under their orders Nos. 979 and 990; the first one dated January 30, 1929, (R. Vol. I, p. 495 and p. 44), and the second one dated April 20, 1929, (R. Vol. I, p. 496 and p. 47), and remained in suspension until the cancellation thereof by their order No. 1032, entered on March 5, 1931.

The Injunctive Order of the Circuit Court of Appeals Dated February 14, 1929. (R. Vol. I, p. 496, and Original Alston Exhibit No. 5).

The first decree of the District Court for the Northern District of Georgia in this matter, which was rendered on the 17th day of January, 1929, (30 Fed. (2d) 116), (O.R. Vol. I, p. 44), dismissed the bills but limited the scope of the order to shipments originating in the northern part of Florida as defined in said decree. On the 30th day of January, 1929,

and effective on that date, the Florida Commissioners issued their order No. 979. It there prescribed, in effect, that the interstate rates should be effective in a minor part of the northern part of Florida as defined in the court's order, over which none of the logs involved in this restitution proceeding moved. This order No. 979 was to "remain in full force and effect on and after February 8, 1929, until the further order of said Railroad Commissioners of the State of Florida, notwithstanding the changes proposed to become effective on February 8, 1929," in the schedules and tariffs which had been filed to express the Interstate Commission's order.

The State of Florida filed its petition in the Circuit Court of Duval County against the Atlantic Coast Line Railroad Company to restrain and enjoin it from violating order No. 979.

The Atlantic Coast Line filed its petition to remove that cause to the United States District Court for the Southern District of Florida and also gave bond in the manner required by law. Nevertheless the Circuit Court of Duval County proceeded to hear the cause and to render an order thereon purporting to enjoin the Coast Line from charging any rates except those stated in the Florida Commissioners' order 979. This order was to "remain in force and effect pending this suit and until the further order of this court." (O.R. Vol. I, p. 140).

The Atlantic Coast Line filed its bill in the United States District Court for the Southern District of Florida, seeking to enjoin the members of the Florida Commission from proceeding further in the Circuit Court of Duval County in the removed case, and also seeking to have the defendants restrained from enforcing the order passed by said Circuit Court of Duval County. The court denied the injunction and re-

straining order and dismissed the bill on the 8th of February, 1929. (O.R. Vol. I, p. 124). This was done on motion of the Railroad Commissioners. Appeal was granted to the Coast Line. The District Court denied the prayers of the motion that a proper order in the nature of a supersedeas be issued. The case was immediately taken to the Circuit Court of Appeals and motion was made in that court for an order in the nature of a supersedeas, (R. Vol. I, p. 498, Alston Exhibit No. 5), and on the 14th day of February, 1929, the said motion was granted. The court entered an order, from which we quote as follows:

> "It is ordered by the court that for the reasons set forth in the aforementioned motion of the Atlantic Coast Line Railroad Company, the said A. S. Wells, E. S. Matthews, and Mamie G. Eaton, and their agents, representatives and attorneys, be, and they are, hereby restrained until the further order of this court, from enforcing or undertaking to enforce the said order of the said Railroad Commissioners of the State of Florida, or the order entered in the Circuit Court of Duval County, Florida, in the cause filed therein by the State of Florida acting through A. S. Wells, E. S. Matthews, and Mamie G. Eaton as Railroad Commissioners of the State of Florida, by T. T. Turnbull, special counsel-general therein, and by Fred H. Davis, attorney-general." (R. Vol. I, p. 496, Alston Exhibit No. 5).

The Circuit Court of Appeals assigned that matter for further hearing on February 21, 1929, and a hearing was had, but the court did not change its order. The effect of this order was to restrain the enforcement of the Florida Commission's order No. 979 and to restrain the order of the Circuit Court of Duval County, Georgia, hereinbefore referred to, and that is, to restrain the enforcement of the Cummer scale

of rates in the territory described in the Commission's order and in the injunction, which territory included all of that over which any of the logs constituting the subject matter of the restitution moved. That order remained in effect until the 30th day of March, 1931, when it was dissolved on motion of the claimants. That date was after the date of the opinion and judgment of this Court in its first appeal (282 U.S. 194) and after the mandates had been entered thereon.

Appellant claims that this order made a cause separate and independent from the order of the District Court of the United States, which had refused to interfere with the Interstate Commission's order of August 2, 1928, and which latter judgment or decree of the United States District Court was reversed.

The litigation out of which came the restraining order from the United States Circuit Court of Appeals was brought about by the wrong of the claimants. There was no jurisdiction over this subject matter in the State courts. See *Lambert Co. v. B. & O. R. R. Co.*, 258 U.S. 377.

There can be no interference with the orders of the Interstate Commerce Commission of the kind here involved except in a proceeding against the United States and in a District Court of the United States, and that in a district prescribed by the statute, for the United States can be sued only in such way as it has consented. The restraining order from the Circuit Court of Appeals was necessary in order to prevent a conflict of penalties. The tariffs evidencing the Interstate Commission's rates had been filed as required by law. They were the lawful rates. There was no power in the State of Florida to take from those rates the quality of lawfulness. Those qualities could not be changed except in the manner

prescribed by the Interstate Commerce Act or as might have been prescribed by the Congress. Those tariffs when filed became absolutely obligatory upon the carrier and upon all other persons. The claimants stepped outside of the litigation in which they claimed restitution to seek a strange and unlawful interference from another source. The result of that was that in order to protect the situation against that conduct this restraining order was granted by the Circuit Court of Appeals. They had succeeded in getting the United States District Court for the Southern District of Florida to improperly deny appellant's motions for restraining order referred to and to dismiss appellant's bill.

When this court (the Supreme Court) rendered its opinion of January 5, 1931, (282 U.S. 194), and its mandates were entered, that did not restore the status and did not permit the use of the Cummer scale of rates because said restraining order was still in effect. The claimants sought and procured an order of the United States Circuit Court of Appeals of March 30, 1931, (R. Vol. I, p. 497, Alston Exhibits No. 7 and 8), which relieved the restraining order, and thereupon, and not until then, was this judicial restraint of the Cummer scale of rates removed.

Of course, the action of claimants in having the Florida Commissioners pass the order referred to and in having the State Court to issue its injunction, in substance restraining the Interstate Commission's order, was wholly without warrant; certainly without precedent; and equally certainly in the teeth of the law; but it was their act. This was restrained by a court which had jurisdiction, and this makes it definitely clear that during practically all the restitution period there was no Cummer scale of rates in effect.

Suspension of the Cummer Scale By Order No. 990.

Appellant, in March, 1929, had filed its petition in the United States District Court for the Northern District of Florida (the District in which jurisdiction over the Florida Commissioners is had), asking that three Judges be called together and seeking to restrain and then to enjoin the Florida Commission's order No. 979, which has been hereinbefore described. This petition was based on the theory that there was a conflict between order No. 979 and the Interstate Commerce Commission's order of August 2, 1928, and that the rate schedules had been filed as required by law to put into effect the rates prescribed by the Commission and that the Florida Commission's order would subject appellant to cross penalties. It was also set up that the rates prescribed in order 979 were unjust and unreasonable, and that the difference in rates prescribed by the Interstate Commerce Commission and those prescribed by the Florida Commission amounted to many thousands of dollars.

On presentation of that bill it was opposed by the Florida Public Service Commission, one of whose counsel was also counsel for the claimants.

On the 8th day of February, 1929, Judge William B. Sheppard, Judge of the United States District Court for the Northern District of Florida, (who was also designated to the Southern District and before whom the last mentioned proceeding was had), entered his decree denying the prayers of appellant, and dismissed the bill. Thereupon, a petition was filed by appellant (Atlantic Coast Line Rd. Co.), praying a writ of mandamus against Judge Sheppard. This was

docketed as Original No. 19, decided May 20, 1929, (279 U.S. 822). Judge Sheppard filed his response, to which there was a reply by this appellant, and thereupon the Florida Commission on April 20, 1929, adopted its order No. 990. (R. Vol. I, p. 498). After many recitations the Commission ordered that its former order, No. 979,

> "be and the same is hereby suspended so long as the said decree of the said United States District Court for the Northern District of Georgia shall remain in force and effect and unmodified and unreversed." (R. Vol. I, p. 49).

It was further ordered:

> "That so long as said decree of the said United States District Court for the Northern District of Georgia shall remain in force and effect and unmodified and unreversed the distance scale of commodity rates in force and effect under authority of the Florida Railroad Commissioners on and prior to February 7, 1929, for the transportation of logs, except walnut, cherry and cedar, between points on the Atlantic Coast Line in Florida, be and they are hereby suspended"; etc. (R. Vol. I, p. 49).

It was then provided that:

> "This order shall remain in force and effect until the further order of the Railroad Commission of the State of Florida." (R. Vol. I, p. 50).

Some of the counsel for the claimants took part in the preparation of this order. On the day of its passage an amended response was prepared by or for Judge Sheppard as an amended return, and this was filed immediately in this court (the Supreme Court). It was set up by him in said amended return, after making the recitations consistent with the statements above mentioned, as follows:

"And so it is that all parts of the said Order No. 979 of the said Florida Railroad Commissioners so entered as aforesaid which were attacked by the said bill and the amendments thereof so filed by said petitioner in said United States District Court for the Northern District of Florida have been suspended by said Florida Railroad Commissioners as aforesaid so long as said decision of said United States District Court for the Northern District of Georgia, rendered on said rehearing, shall remain in force and effect and unmodified and unreserved. And the said decision and decree of said last described Court is still in force and effect and has not been modified or reversed."

Respondents' amended return then suggested that the proceeding had become moot. This was answered by the Atlantic Coast Line, who denied that the proceeding had become moot. This court sustained the petition and directed that mandamus issue.

On the trial of the cause now at bar it was asserted that Orders Nos. 979 and 990 were illegal because no notice had been given and that under §6722 of the Compiled Statutes of Florida for 1927, the Florida Commission was required, before changing, revising, fixing, adopting or allowing any schedule of rates, to give public notice of their intended action in newspapers, at such time as the Commission shall deem fair and reasonable. However, under §6723, it is provided as follows:

"Where the public interest does not require that public notice shall be given in a newspaper, such publication may be omitted, and the commissioners shall give personal notice to the common carriers and other parties interested."

The Atlantic Coast Line does not complain that either of the orders was invalid because of lack of notice to it. The Florida Railroad Commissioners have no right to complain on this account for said orders were their acts; especially in view of the fact that Judge Sheppard's amended answer was prepared in part by some of the counsel for the claimants and by the Attorney-General of Florida. (See stipulation, R. Vol. I, p. 407). Especially is this so when the said orders were presented to this Court as being legal and with the purpose of undertaking to influence the action of this court on the ground that they were legal. To this presentation to this Court the Florida Commission and the claimants were parties in the manner hereinbefore set out.

The lower court did not pass upon the effect of the judgment or of the suspension. The opinion fairly shows, as we contend, that the court believed that the orders had been suspended. They found it unnecessary to decide the question because the court was a unit holding that the Cummer scale of rates was confiscatory, and if that finding is undisturbed in this court, the question of its suspension by order No. 990 should no doubt be governed by that ruling.

The Legal Effect of the Restraining Order.

We think the restraining order issued by the United States Circuit Court of Appeals for the Fifth Circuit stands upon a different basis. When the United States Circuit Court of Appeals issued its restraining order preventing the enforcement of the Florida Commission's order No. 979 and of the judgment of the Circuit Court of Duval County, it was another way of restraining the enforcement of the Cummer scale of rates.

There was then a cause independent of and in addition to the decree of the United States District Court for the Northern District of Georgia, which brought about the displacement of the Cummer scale of rates. That cause was the result of the unusual and erroneous course followed by claimants, which has been described and which put into this case an independent cause of the suspension of the Cummer scale, the legality of which latter cause is beyond dispute.

The judgment of this Court and the entry of its mandates did not have the effect of reinstating the Cummer scale of rates. In evidence of this we find that the mandates were entered on March 7, 1931, and an order was entered by the United States District Court for the Northern District of Georgia declaring the Interstate Commission's order of August 6, 1928, to be null and void. (R. Vol. I, p. 53). Yet claimants found it necessary to move the Circuit Court of Appeals for dissolution of the injunction referred to and they did so move and that order and the injunction was not removed until the 30th day of March, 1931. (R. Vol. I, pp. 497-98, Alston's Exhibit No. 8).

We respectfully submit that the action of the District Court for the Northern District of Georgia was not the sole or exclusive nor the controlling cause of the suspension of the Cummer scale of rates, but from February 14, 1929, to March 30, 1931, those rates were under another and different injunction procured in the circumstances which we have described and issued out of another court.

BALTIMORE & OHIO v. UNITED STATES, 279 U. S. 781 (1929).

The claimants strongly relied on the above cited case as supporting their right to recover on the basis of the Cummer scale of rates. Their claim, as we understand it, is that under this case the Cummer scale of rates became the hard and fast rule by which their measure of recovery should be determined.

It does not appear to us that the *Baltimore & Ohio* case has any application at all to this question.

That case was first before this Court as *Baltimore & Ohio v. United States*, 277 U. S. 291. The matter under consideration was the division of combination through rates at St. Louis. It was a controversy between railroads designated as "West Side" roads and "East Side" roads. The West Side roads with termini at St. Louis exchanged traffic with the East Side roads by means of the facilities of the Terminal Railroad Association, jointly owned or controlled by appellant and appellee lines. In order to meet the competition on through freight brought about by the Chicago & Alton and other western roads which reached East St. Louis by independent routes, the West Side roads had long maintained the same rates from and to East St. Louis as from and to St. Louis, absorbing the Terminal's transfer charges on west-bound as well as east-bound traffic. The East Side roads bore no part of such charges and where, as in most cases, their St. Louis and East St. Louis rates were the same, they were limited by appropriate tariff provisions as applicable to through traffic moving on combination rates. The West Side roads complained to the Interstate Com-

mission, on the basis that the exchange of traffic on this plan made an unjust "practice" under certain sections of the Interstate Commerce Act.

The Commission sustained the complaint and directed the terminal charges to be paid by the East Side roads.

The East Side roads brought their bill to set aside the order of the Commission. The District Court dismissed that bill for want of equity. This Court in its first case (277 U. S. 781) held that the matter complained of did not constitute a "practice" within the meaning of the Interstate Commerce Act; and also that the evidence was not sufficient to support a finding "that it is or will be unjust or unreasonable to require the West Side lines to bear such transfer charge or to warrant the order."

The order of the Commission was set aside.

The East Side roads then brought their petition for restitution of the amounts which they had paid under the order because of the erroneous decree. This Court in its opinion in 279 U. S. held the East Side roads were entitled to restitution; that the order should have been set aside in the first instance; that as a result of the erroneous refusal of the Court, the burden of the transfer charges in question was shifted from the West Side roads to the East Side roads, and was by them borne until the order was set aside on the reversal of the decree dismissing the bill; that while the subject of the controversy and the parties were before the Court, it had jurisdiction to enforce restitution and so far as possible correct what had been wrongfully done.

In the *Baltimore & Ohio* case (279 U. S. 781) the superseded basis of divisions had not been declared unreasonable or unjust.

In the case at bar the superseded State rates (Cummer scale) were declared to be unreasonable by the Interstate Commission in the report on which the Commission's order was based; and in the two succeeding reports; it was likewise declared to be unreasonable in the opinion of the Court in the second proceedings before it on this subject [31 Fed. (2d) 580]; it was found by the Master and by the Court to be confiscatory.

The case at bar was not to recover a definite amount by each claimant, but to recover the difference between the amount paid by the claimants and the amount which might be established as the lawful rate in force at the time each shipment moved. The Cummer scale of rates was not the "lawful rate in force" at the time of any business here involved.

In the *B. & O.* case the claimants were entitled to recover the whole of the terminal charge on the east-bound traffic in controversy; that is, there was no occasion for the making of a yard-stick to measure what was a reasonable charge for that service.

The subject-matter of the litigation in the *B. & O.* case, as presented, was not within the jurisdiction of the Interstate Commission; that is, the case was tried as though it involved a "practice" rather than a division of rates. This Court held that it was in the latter category.

"There was nothing to support" the finding in the *B. & O.* case (277 U. S. 301-2) to the effect that it would have been unjust or unreasonable for the appellees to bear the cost of the transfer there involved. In the case at bar there was much evidence to support the finding that the Cummer scale

of rates was unjust, unreasonable and confiscatory, and such findings were made by both the Commission and the Court.

Furthermore, we have at some length shown that under the laws of Florida a carrier who charges a rate greater than that prescribed by the Railroad Commissioners may, when sued for the difference between the rate charged and that prescribed, defend by showing that the Commission's rate is unjust and unreasonable.

The District Court in its opinion in this case filed January 30, 1933 (R. Vol. I, p. 159), held that the rate in question

> "being a Florida rate, it must be tested by Florida law." (R. Vol. I, p. 167).

If this controversy is to be determined by the Federal law, it should have first been passed upon by the Interstate Commerce Commission.

The claimants did not elect to do this, and the lower court did not require that this be done.

That left the lower court with the Florida law as the only guide to their course of action.

Elsewhere we have contended that the subject should have been submitted to the Interstate Commerce Commission and that it did not become actionable until that Commission had acted upon it. We believe that to be correct and do not now depart from it.

Burden of Proof.

In the trial of this case, on the second hearing, the claimants accepted the burden of proof. The law placed this burden on

them. We have seen that the rates prescribed by the Florida Commission shall have only prima facie effect. In the first hearing, after the proof of the amount of the difference between the collections as actually made by the appellant under the rates fixed by the Interstate Commerce Commission and the amount which would have been collected if the Cummer scale had been applied, the burden was then on the appellant to show that the rates prescribed by the Florida Railroad Commissioners were not the lawful rates. The appellant accepted that burden and sustained it. When the case was rereferred the status was that the burden which had fallen on the appellant in the circumstances just stated had been shifted to the claimants.

In the case of *Pensacola & Atlantic Railroad Co. v. State,* 25 Fla. 310, (5 Southern 833), the Supreme Court of Florida states the rule as follows:

> "Under the statute the burden will be upon the company to make out a *prima facie* case, sustaining its plea, before the State will be called upon to introduce any evidence, and, if this be done by the company, the State must then, through the instrumentality of its commissioners, and any other proper means, establish the justice of the action of the commissioners in fixing the schedule of passenger and freight rates against the arraignment which the company has made of them in its third plea."

The burden which was assumed by the claimants was to show first that the rates which the appellant had charged for the transportation of logs in Florida during the restitution period—February 8, 1929-April 10, 1931, *exceeded the rights of the railroad.*

The presumption is that what the railroad did in reference to those rates was within its rights. This burden required the

claimants to go further and show *the extent*, if any, by which the railroad did exceed its rights, for the presumption of good faith, integrity and correctness was with the carrier.

See *Interstate Commerce Commission v. Chicago Great Western Railway Co.*, 209 U.S. 108, 119, 120.

The Supreme Court of Florida has expressed the same thought, possibly more strongly, in the case of *State v. Florida East Coast Ry. Co.*, (64, Florida 112) (59 Southern, 385, 395).

This Court held in *Western Union Tel. Co. v. Call Publishing Co.*, 181 U.S. 92, that the following charge given by the trial court to a jury in a suit against the Western Union Telegraph Company for discrimination was correct:

> "You should approach this case, not in an attitude as if you were charged with the duty of determining rates for the telegraph company. Its stock is the property of private individuals, who have elected officials for that purpose. They are there to manage the affairs of their corporation in their own way, so long as what they do is within reason. Courts of law are maintained to correct abuses, *and it is only after the plaintiff has convinced you that the telegraph company has abused its privileges that the court will interfere.*" (Italics added.)

The court further charged the jury:

> "No recovery can be had unless it is shown not merely that there is a difference in the charges but that difference is so great as under dissimilar conditions of service to show an unjust discrimination and that the recovery must be limited to the amount of the unreasonable discrimination."

The court then states:

"No one can doubt the inherent justice of the rules thus laid down."

In discussing the extent of the damages the lower court charged the jury:

> "It may be said that it would be difficult to produce evidence to show to what extent such differences in conditions reasonably affect rates. This may be true, but the answer is that whatever may be the difficulties of the proof, a verdict must be based upon the proof and a verdict must be founded upon evidence and not upon the conjecture of the jury, or its general judgment as to what is fair, without evidence whereon to found such judgment."

The carrier has the right to manage its own affairs and exercise its own judgment respecting rates "so long as he keeps within the bounds of reasonable maximum rates." See *Southern Pac. Co. v. Railroad Commission of Georgia*, 208 Fed. 926, 935.

This Court has given expression to very much the same thought in *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U.S. 88 at 92. The court was there dealing with an interstate rate and after referring to the fact that the carrier retains the primary right to make rates but the Commission may set them aside and substitute its own rates if the railroad's rates are found to be unreasonable, said:

> "The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order."

In *Standard Oil Co. v. Atlantic Coast Line Railroad Co.*, 13 Fed. (2d) 633, (a case which has been hereinbefore re-

ferred to and which deals with the Florida statutes), the court said:

> "So, in an equity action against the railroad company to enforce the rates fixed by the Florida Railroad Commissioners, if any question should arise as to the reasonableness of the rates relied upon, the burden would be upon the railroad company to establish their unreasonableness. On the other hand, in a common law action to recover money paid in excess of reasonable rates, it would be necessary for the plaintiff, in order to recover at all, to allege that the rates charged by the carrier were unreasonable and *extortionate*, and the burden would be upon plaintiff to prove their unreasonableness. No recovery could be allowed a plaintiff in such an action until he had established to the satisfaction of the jury, not only that the rates charged were unreasonable, *but the extent of their unreasonableness.*"

The claimants made no adequate effort to carry the burden of proof placed upon them by the law. They have tried their cases before the Master and before the court on the theory that the Interstate Commerce Act and the requirements thereof have nothing to do with this case. They contend that discrimination against persons and places and particular classes of traffic and interstate commerce, and that each class of traffic shall bear its fair proportionate share of the expense of operating and maintaining the transportation system, are to be put to one side in determining what is a just and reasonable rate for the transportation service rendered by the defendant during the period involved (February 8, 1929, to April 10, 1931).

Of course, the carrier had the right in the circumstances at hand to make the rates, and it had the right to make the highest maximum reasonable rates.

The Interstate Commerce Commission had prescribed in eight different circumstances during the eleven years prior to the hearings before the Master on the second reference, rates on logs between points in the Southern territory and those rates were never lower for any distances than the scale of rates prescribed by it for application over the Atlantic Coast Line in Florida in its reports of August 2, 1928, July 5, 1932, and January 9, 1933. The log tonnage of railroads in the South which handled the bulk of the log traffic was, during the two-year restitution period, moved at rates that were equally as high as those charged by the Atlantic Coast Line on logs in Florida during the period here involved. The rates which the appellant used in moving the logs in question during the restitution period were not greater than those fixed by the Interstate Commerce Commission and the Commissions of the several States in the Southern territory for use in like movements during the restitution period. This is true notwithstanding the fact that Florida is the most expensive territory in which the Atlantic Coast Line operates. Note Exhibits 44b-60b; 73b; 76b and 77b and evidence of the witness Perrin, beginning at R. 1170. They were the rates which the Interstate Commission three times found to be the minimum rates necessary to prevent unjust discrimination against interstate commerce.

The Method Used by the Court in Determining the Basis of Measuring Restitution Did Not Meet the Requirements of the Law In That It Did Not Take Into Consideration Discrimination Against Interstate Commerce.

The order of re-reference filed on January 30, 1933, (R. Vol. I, p. 172) recommitted this case to the Master,

> "With direction that he ascertain whether the charge made by the carrier for transportation in each instance was a reasonable one as measured by common law standard, and if not, what was the reasonable charge to be made, and that he measure and award to each claimant restitution accordingly." (R. Vol. I, p. 172).

The Court in its opinion and order filed January 26, 1934, passing on the exceptions to the Master's second report (R. Vol. I, p. 349) held:

> "In establishing the fair and reasonable charge to be made for these past shipments the master rightly held that statutes, both state and federal, which control the making of future intrastate rates should be regarded. The common law standards of charges by common carriers when legislative rates have not been prescribed are modified by such statutes." (R. Vol. I, p. 350).

The Court thus treats the common law standard as meaning not only purely the common law standard but the common law as changed by appropriate statutes.

The Master in his second report held on this subject as follows: [See subdivision 3(c) R. Vol. I, p. 195].

> "The Act of Congress authorizing the I. C. C. to establish such intrastate rates as will not be an unjust

discrimination against persons and localities or against interstate commerce, and as will bear an amount of revenue that will contribute a proportionate share towards maintaining an adequate national railway system, *does not in and of itself provide that the rates established by State Commissions shall under any state of facts be unlawful, until they have been considered after a full hearing by the Interstate Commerce Commission and a finding made by it that they cause unjust discrimination against interstate commerce or otherwise violate the Act.*" (Italics added).

The Master overlooked the provisions of §§ 3 and 13(4) of the Act to Regulate Commerce. We quote from § 3(1) as follows:

Be it Enacted, etc.

"That *it shall be unlawful* for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (Italics added).

§ 13(4) of the Act is as follows:

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign

commerce, *which is hereby forbidden and declared to be unlawful*, it shall prescribe the rate, fare or charge, or the maximum or minimum, or maximum and minimum thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding." (Italics added).

The Master misinterpreted the decision of this Court in *Board of Commissioners of North Dakota v. Great Northern Railway Co.*, 281 U. S. 412, and other cases such as *Great Northern Rwy. v. Merchants Elevator Co.*, 259 U. S. 285, 291, which require preliminary resort to the Commission whenever a rate, rule or practice is attacked as unreasonable. In other words, the Court will not enjoin a rate on the ground that it is unjustly discriminatory until the Commission shall have first determined that it is unjustly discriminatory. That does not mean that the rate is not unlawful and is not prohibited until the Commission shall have acted upon it; but it does mean that no intrastate rate is a just or reasonable or lawful one if it works unjust discrimination against interstate commerce. See *Texas & P. Ry. v. Abilene Oil Co.*, 204 U.S. 426, 437.

The Court in passing upon the exceptions to the Master's second report (January 26, 1934; R. Vol. I, p. 349) does not completely follow the Master, yet in effect does, for it is held by the Court in its opinion:

"The common law standards of charges by common carriers when legislative rates have not been prescribed

are modified by such statutes. Since, for instance, the Florida law prohibits discrimination by common carriers, discrimination ought to be avoided not only in fixing future rates but as far as practicable in measuring compensation for past services. *The prohibition of federal law aimed at discrimination by state rates against interstate commerce is not easily applicable to such a case as this, because the existence thereof involves questions so technical and complex as not to be well examinable in a court trial and is referred by the statutes specially to the Interstate Commerce Commission; but the fact that such discrimination is prohibited is a matter that should have some bearing on the present problem.*" (R. Vol. I, p. 351; Italics added).

The Court also said:

> "Discrimination as respects the revenues of the carrier, while a most important question in fixing permanent future rates, can hardly be investigated or considered in a private litigation between carrier and shipper regarding a past shipment." (R. Vol. I, p. 353).

The Court realized that the aforementioned quoted sections of the Interstate Commerce Act should be applied in reaching a just result in this case. It then recognized that the existence of such unjust discrimination involved questions so technical and complex as not to be well examinable in a court trial and is referred by the statute especially to the Interstate Commerce Commission. However, the Court refused to await the action of the Interstate Commission through appellant moved it so to do. The Court then proceeded to reach exactly the same result which the Master had reached while the Master was of the opinion that a state rate did not become unlawful until after such ascertainment by the Interstate Commission.

In fact, neither the Master nor the Court applied the principle that it was unlawful for state rates to be unjustly discriminatory against interstate commerce. As evidence of this, the District Court in its opinion of January 26, 1934 (R. Vol. I, p. 324) found immediately under the heading: "Findings of Fact":

> "The testimony as to the cost of hauling the logs satisfies us that the master's finding of a reasonable charge affords compensation to the carrier. It may be that trainloads might have been carried profitably at a less rate, but the traffic as a whole could not be carried for much less. *Whether compensation should not be more liberal gives us the most concern. In view of the experience of the Interstate Commerce Commission and its full and repeated consideration of these very rates, we should have inclined to think the rates which they fixed, first for interstate traffic, and then for intrastate traffic on logs, ought to be accepted as the fair charge.* Against this, however, is the thought that they were not dealing with past transactions but attempting to fix a future rate to which carriers and shippers ought to conform themselves, and the fact is strong that the low rates were voluntarily established and maintained over a long period by the carrier, and on the faith of them these claimants had made investments and established businesses which would be and were very disastrously affected by a sudden and drastic raising of rates." (R. Vol. I, p. 353; Italics added).

However, the bare fact that the rates afford compensation to the carrier does not relieve them of the quality of unjust discrimination. It was necessary for them to do more than that; they should carry their fair proportionate share of the expense of maintaining an adequate transportation system. See *Wisconsin Rd. Comms. v. C. B. & Q. Rd.*, 257 U. S. 563.

The Supreme Court of Florida in *State v. Atlantic Coast Line Rd. Co.*, 95 Fla. 14, 116 Sou. 48, has made strong recognition of the fact that:

> "The dominating purpose of the Interstate Commerce Act was to secure conformity to prescribed standards through examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as the Supreme Court of the United States has frequently said, it would be destructive of the system of regulation defined by the Interstate Commerce Act if the court, without the preliminary action of the Interstate Commerce Commission, were to undertake to pass upon the administrative questions which the Act has primarily confided to the Commission."

After citing a number of cases the Florida Court continues:

> "In all these cases and many others we have examined on this question the preservation of uniformity and the prevention of discrimination in rates in interstate commerce, as defined in the Interstate Commerce Act, was the controlling principle leading the court to its conclusion."

The District Court in the case at bar found in its opinion of January 26, 1934, that

> "the decision of the Interstate Commerce Commission of July 5, 1932, (186 I. C. C. 157) that the Cummer scale resulted in discrimination against interstate commerce as respects the carrier's revenues and that for the future a state rate conforming to the interstate rates on logs be applied has no retroactive effect and does not constrain a finding that in 1929 and 1930 the interstate rates were the only just and reasonable charge in this intrastate traffic." (R. Vol. I, p. 351).

The Court holds that:

> "The prior findings of the Interstate Commerce Commission in 1928 which resulted in no valid order had no legal effect and can be given only such weight and persuasiveness as their reasoning carried with it." (R. Vol. I, p. 351).

The District Court overlooked the fact that this Court did not set aside the *findings* made by the Interstate Commerce Commission in its report of August 2, 1928. The Court has no power to set aside the *findings* of the Commission. The Court deals only with affirmative orders of the Commission; the findings of unjustness and unreasonableness contained in that report were in effect every day since it was rendered. The order was set aside on the basis that the finding of unjust discrimination against interstate commerce was not supported by sufficient intermediate findings. The findings of the Commission in the reopened proceeding in July, 1932, (186 I. C. C. 157; Exhibits, p. 171) as we have seen, reaffirmed the Commission's previous findings. This was likewise done in the Commission's third report made in January, 1933, (190 I.C.C. 583, Exhibits, p. 158). It then made sufficient intermediate findings to sustain its then finding of unjust discrimination against interstate commerce. It had found in both instances that the conditions under which the intrastate and interstate traffic was carried on in these logs were the same. The rates fixed for interstate commerce by its first order remained in effect throughout. The rates which were fixed for interstate commerce were the same as those fixed for intrastate commerce and were the same as the ones fixed in its second report and order, and confirmed in the third report. The Court put these facts to one side and made different findings as to what were the reasonable and just intrastate rates.

The Commission had found that the relation which it created between the interstate and intrastate rates was necessary in order to prevent unjust discrimination. That relation was that the rates interstate from points in North Florida to points in Georgia were the same as the rates prescribed for intrastate traffic in Florida on the commodity involved.

We thus see that the Master said that an intrastate rate unjustly discriminating against interstate commerce is not unlawful and prohibitive unless it has been so ascertained by the Interstate Commerce Commission. It would appear, therefore, that he did not consider that unjust discrimination worked by an intrastate rate against interstate commerce was in and of itself unlawful.

It must also be clear that the Court in sustaining the Master made no adequate consideration of this subject. It practically admitted that it was impracticable for a Court to consider and determine it. Its determination on this subject was the same as the Master's determination whose findings had been from the erroneous premise.

The District Court thinks that the rates fixed by the Interstate Commerce Commission in its order which was held to be valid and dated July 5, 1932, (186 I.C.C. 157; Exhibits, p. 171) should not control the rates during the restitution period (February 8, 1929 - April 10, 1931). What fact occurred in the meantime to justify a different rate? The Interstate Commission twice reaffirmed, as we have seen, its first findings. There is no evidence to show any difference in fact; there is no finding by the Master of any difference in fact. *The decision of the Master and of the Court below seems to us to lead to one of two conclusions: Either that the*

Court below was completely in error in admitting it had jurisdiction of the subject, or that the Court in truth had no jurisdiction of the subject until the Interstate Commission had passed upon it.

The District Court's Present Findings Are Inconsistent With Its Previous Findings.

The District Court in its opinion of January 26, 1934, under the Heading, "Conclusions of Law," (R. Vol. I, p. 353), made the following statement:

> "On the other hand, the fact that the state rate relied on by the shippers during all this period was one originally named by the carrier and voluntarily maintained by it for many years while the shippers were making their investments and establishing their businesses upon the faith of it, is deserving of great weight in considering the fairness as between carrier and shipper of suddenly demanding more than double that rate."

This is scarcely in accord with the opinion of the District Court in the first case, *State of Florida v. United States,* 30 Fed. (2d) 116, 121, where the court said:

> "The serious effect of altering the rate upon the business of complainants and their investments made on the faith of them is strongly urged. Such things may be considered by the Commission in determining what is just and reasonable, or undue or unfair, without vitiating their finding (*I.C.C. v. Union Pacific R. Co.*, 222 U.S. 541, 32 S. Ct. 108, 56 L. Ed. 308), and were considered in this case. But such considerations cannot be the sole basis of a rate order. *Southern Pacific Co. v. Interstate Commerce Commission,* 219 U.S. 433, 31 S. Ct. 288,

55 L. Ed., 283. A fortiori they alone cannot avail in this court to overturn an unfavorable order."

It also overlooked the finding of the Commission in this case (*Georgia Public Service Commission v. Atlantic Coast Line Railroad*, 146 I.C.C. 717, 723), where the Commission called attention to the evidence of witnesses as to the effect of the increase in rates upon their plants, alleging that it would cause them to move their plants to the timber or abandon operations, and that large amounts of money had been spent upon them;

And to the finding of the Commission in the second case (*Georgia Public Service Commission*, 186 I.C.C. 157, 169), where, after the Commission recited certain evidence as to the amount of logs shipped, said:

> "There was evidence to the effect that it was uneconomical for plants to be located so far from the timber, and that even the Cummer scale for that distance, 3.7 cents, was higher than these mills could afford to pay. The Putnam Lumber Co. then indicated their intention to abandon those mills and to develop a plant in the timber. In 1926 it acquired a mill at Bond's Mill, about 85 miles south of Jacksonville; and in 1927 and 1928 it completed the construction of two mills at Cross City," etc. (Exhibits, p. 183).

There was ample evidence to sustain the finding that it was uneconomical to maintain the mills for the manufacture of lumber so far from the standing timber. See evidence of the witness Fleishel. (R. Vol. II, p. 818). The Cummer Lumber Company built a plant at Lacoochee, Florida, (that is very near the timber) in 1923. (R. Vol. I, p. 873). This case did not begin until May, 1926. (146 I.C.C. 717). See evidence of the witness Foley. (R. Vol. I, p. 870).

We respectfully submit that the position of the District Court in the present instance should have been in harmony with its first decision.

This is another reason why the District Court should have left this case to the Interstate Commerce Commission for decision.

Cross-Appeal

At the time of the writing of this brief the Atlantic Coast Line has not received copy of the brief of the cross-appellants. The assignments of error for the State of Florida and its Railroad Commission are to be found at R. Vol. I, p. 418; the assignments of error for Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company are to be found at page 422 and for Wilson Lumber Company of Florida at page 427.

Appellant's foregoing briefs appear to cover the chief points made by the cross-appellants.

Chief Points Made By Cross-Appellants.

All the cross-appellants make their chief point the fact that the District Court did not use the Cummer scale of rates as the yardstick by which their rights were measured; that is, they claim that they should have had the full amount of the sums claimed by them respectively in the restitution proceeding, those sums being the difference between the amounts collected under the scale of rates fixed by the Interstate Commerce

Commission and the amount which would have been collected under the Cummer scale.

They also make the point that the court should not have considered

(*a*) The State statutes; or

(*b*) The Federal statutes

which relate to the making of rates to be established for future application; and that the court should not have given consideration to unfair discrimination worked by common carriers claims, in any form either as between persons of localities or as against interstate commerce

(*a*) Under the Florida statutes; or

(*b*) Under the Federal statutes.

The cross-appellants, other than the State of Florida, make the further point that there should have been a different charge for shipments moving in train-load.

Insofar as the cross-appellants invite a bare weighing of testimony by this court we take it that this will not be done, because of the findings of the Commission and of the lower court.

We desire briefly to discuss the matter of movements in train-loads.

The Rates Known as the Cummer Scale Were Originally Train-load Rates.

The rates under the Cummer scale were proposed as train-load rates. The Florida Commission opposed this for reasons which are set out in correspondence to be found in 186 I.C.C.

at 190 (Exhibits, p. 204). The beginning of the Cummer scale of rates is explained by the witness Perrin at R. Vol. I, pp. 542, et seq.

In the letter of October 9, 1914, appearing at 186 I.C.C. 190, 191, the Florida Commission rejected the tariffs which had then been filed with it to evidence the Cummer scale, applicable "when two or more cars are shipped from one station in one day by one shipper for delivery to one consignee at one destination." That was the second time that the Florida Commission had called attention to the fact that rates were not to be trainload rates.

In the letter dated August 18, 1915, (186 I.C.C. 191, 192) the then Chairman of the Florida Railroad Commission stated the Florida Commission had required the Atlantic Coast Line to cancel the tariff or make it applicable between all stations on its lines in Florida, and that in any event they would have to cancel the application of the rate to logs in train-load lots, "as the Commissioners *would not recognize anything above the carload as a rate-making unit.*" (Italics added; 186 I.C.C. 192).

> "In the application of railroad freight rates, *it has been definitely settled that no larger unit than the carload can be observed.* Trainload rates were disapproved in the early history of regulation on the ground that it would be unjust to the public generally to make rates in such manner, because of the limited few that could take advantage of rates based upon a trainload unit." (Italics added). See J. Haden Alldredge on *"Rate-Making for Common Carriers,"* p. 38.

This principle is recognized in many decisions. See

Private Wire Contracts, 50 I.C.C. 731, 758;

Woodward-Bennett Co. v. S.P.L.A. & S.L.R.R. Co., 29 I.C.C. 664, 665;

Ex-Lake Iron Ore from Chicago to Granite City, Ill., 120 I.C.C. 75.

In *Public Service Commission v. State Ex Rel Great Northern Railroad*, 118 Washington 629 (204 Pac. 791), the Commission had allowed a special rate on shipments of logs in trainload quantities. This was held to be illegal. The Washington Court said:

> "The Commission should not have considered the fact that the timber company shipped by trainloads, thus tending to make the cost of transportation less: The various commissions and the court have held that to charge one furnishing trainload lots a less rate than a competitor furnishing less than trainload lots is unlawful, because it is in effect 'allowing lower rates upon a condition which only a few shippers can comply with, and, consequently, is an injustice to those unable to ship the required quantity.'"

See also *Burlington, C. R. & N. Ry. Co. v. Northwestern Fuel Co.*, 31 Fed. 652; *Kinsley v. Buffalo, N. Y. & P. R. Co.*, 37 Fed. 181; *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309; *Scofield v. Lake Shore & M. S. Ry. Co.*, 43 Ohio St. 571 (3 N.E. 907).

In Vol. I, third edition of Watkins on *Shippers and Carriers*, p. 455, it is stated:

> "§159. TRAIN LOADS—The usual course of business must be considered in determining questions of discrimination, and while there may be some basis in logic for the claim that a lower rate a car should be made on train loads than on carloads, in fact trainloads are rarely used and such a unit of quantity would not be equitable or justified. This principle is well expressed by the Commission as follows:

" 'Whatever difference there may be in the cost to the carrier between traffic in trainloads and traffic in carloads, it appears from the general course of legislation with respect to commerce between the states, from the debates and reports of the various committees in Congress when the Act to Regulate Interstate Commerce was under consideration, from the better considered court opinions, and from the reports and opinions of this Commission, that to give greater consideration to trainload traffic than to carload traffic would create preference in favor of large shippers and be to the prejudice of small shippers and the public';" citing *Anaconda Copper Mining Co. v. Chicago & E. R. Co.*, 19 I.C.C. 592, 596; *Carstens Packing Co. v. Oregon S. L. R. Co.*, 17 I.C.C. 324, 328; and others

The Supreme Court of Florida has announced the same principle though not applied in this instance to trainloads. See *L. & N. R. Co. v. Speed-Parker, Inc.*, 103 Fla. 439 (137 Sou. 724), where the court held as follows:

"Any construction which permits any shipper to load into any vehicle a greater quantity of freight than his competitor in another vehicle, and pay no more for the greater quantity than his competitor does for the smaller, offends against one of the elemental principles underlying our statutory system of public regulation of common carriers; that is, uniformity of treatment to passengers and shippers, and the elimination of all unjust discriminations."

The rates under the Cummer scale were in fact trainload rates which, because of the action of the Florida Commission, were transformed into carload rates. This has been lost sight of by some of our opponents who treat them as though they were carload rates to begin with and when applied to trainloads should be reduced.

The District Court's opinion of January 26, 1934, (R. Vol. I, p. 352), on which the decree appealed from is based, recognized that

> "The Florida Commission refused to permit the Cummer scale to be filed as a trainload rate." (R. Vol. I, p. 352; see also appendix No. 1, p. 5).

The opinion also recognized that the Interstate Commerce Commission did not establish any trainload rates on logs either in interstate commerce or in prescribing an intrastate rate in this proceeding in its second report in July, 1932, (186 I.C.C. 157) "although it was well aware of the difference in the cost of handling, but it fixed rates only for carloads." (R. Vol. I, p. 352).

It is respectfully submitted that this cause should be reversed on the direct appeal and that the cross appeal should be dismissed.

ALFRED P. THOM,

CARL H. DAVIS,

W. E. KAY,

ROBERT C. ALSTON,

WM. HART SIBLEY,

Attorneys for Atlantic Coast Line Railroad Company.

January 7, 1935.

APPENDIX NO. 1

(Copy of opinion of the United States District Court for the Northern District of Georgia, rendered January 22, 1934 and filed January 26, 1934.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION.

BROOKS-SCANLON CORPORATION, ET AL VERSUS THE UNITED STATES OF AMERICA, ET AL	No. 511
WILSON LUMBER COMPANY OF FLORIDA VERSUS THE UNITED STATES OF AMERICA, ET AL	No. 512
STATE OF FLORIDA, ET AL VERSUS THE UNITED STATES OF AMERICA, ET AL	No. 514

The above stated consolidated case came on for hearing upon exceptions by all parties to the second report of the master. The exceptions which relate to the admission of evidence do not set forth the evidence referred to, but require

the court to search the very voluminous record to find it. We overrule these exceptions because of this failure, and because so far as we can identify the evidence referred to it appears, while of great bulk, to be of little if any weight and importance. Many exceptions relate to matters of mere recital or argument in the report rather than to findings of ultimate fact or conclusions of law, and we overrule such for immateriality. The exceptions which have real substance are dealt with adversely in what we now express as our conclusions and findings. We do not agree with all that is said in the report, but we do affirm its important positions and the result reached.

CONCLUSIONS OF LAW

When simple restitution was blocked by the finding under the first reference to the master that the Cummer scale was after its withdrawal as a voluntary rate not a lawful establish rate because unremunerative and confiscatory, one member of this court was of opinion that restitution could not be accomplished and that the court should deny it. The majority held that inasmuch as all parties were before the court and much time had already been taken and much expense incurred in investigating the matter, that it ought under the circumstances to be brought to a conclusion, and they ordered a further prosecution of it not as a simple restitution of a status with no adjudication of rights but as a final ascertainment of the true account between the Railroad Company and each shipper before the court. The question is now raised whether the claimants of restitution by going forward under the conditions then imposed on the re-reference did or did not waive all contention as to the applicability of the Cummer scale, or, to put it otherwise, whether the re-reference could

proceed without a formal renunciation of that contention. One of the two judges who concurred in the re-reference is of opinion that the condition meant only that a result should be reached on full hearing of the merits of the claims, and should so adjudicate them that there should be no suits on them before other tribunals, but that there might be a full review of all rulings made in regard to the Cummer scale or otherwise. The other concurring judge is of opinion that an abandonment of the Cummer scale as a measure of the restitution was also required. His thought is not that the right of appeal from the decision of this court that the Cummer scale is void should be denied claimants, but that restitution being not an absolute right but granted *ex gratia*, the affixing of a precedent condition to the grant of the right of ascertaining what, if any, restitution is recoverable based upon compensation for service on the basis of *quantum meruit*, that there should be an abandonment of the right claimed of recovery on the Cummer scale, as such, is fair and equitable. In view of this disagreement we cannot decide the point. But it is immaterial in this court, since all three judges concur in the opinion that the Cummer scale is not available to measure restitution because it is confiscatory and void as an enforced rate.

The original burden of proof was upon the claimants of restitution. When they showed what they had paid, and that it was in excess of the Cummer scale, the apparent state rate, the burden shifted to the Railroad Company, which assailed the Cummer scale and overturned it as an obligatory rate. Under the conditions of the re-reference the burden then returned to the claimants to show what should in right and justice be restored to them, the case standing much as though they were suing in a court of law for overcharges. But the

placing of the burden of proof is of no great practical importance because an abundance of evidence was offered by both sides, and the master's decision and our own goes on the evidence produced and not on the failure of either party to produce proof.

In establishing the fair and reasonable charge to be made for these past shipments the master rightly held that statutes, both state and federal, which control the making of future intrastate rates should be regarded. The common law standards of charges by common carriers when legislative rates have not been prescribed are modified by such statutes. Since, for instance, the Florida law prohibits discrimination by common carriers, discrimination ought to be avoided not only in fixing future rates but as far as practicable in measuring compensation for past services. The prohibition of federal law aimed at discrimination by state rates against interstate commerce is not easily applicable to such a case as this, because the existence thereof involves questions so technical and complex as not to be well examinable in a court trial and is referred by the statutes specially to the Interstate Commerce Commission; but the fact that such discrimination is prohibited is a matter that should have some bearing on the present problem. Nevertheless we agree with the master that the decision of the Interstate Commerce Commission of July 5th, 1932, that the Cummer scale resulted in discrimination against interstate commerce as respects the carrier's revenues and that for the future a state rate conforming to the interstate rates on logs be applied has no retroactive effect and does not constrain a finding that in 1929 and 1930 the interstate rates were the only just and reasonable charge in this intrastate traffic. The prior findings of the Interstate Com-

merce Commission in 1928 which resulted in no valid order had no legal effect and can be given only such weight and persuasiveness as their reasoning carried with it. There is, of course, no rigid necessity for intrastate rates to conform with interstate rates. They frequently do not conform, and where there is divergence it becomes a question which are the more just and reasonable.

The cost of the service is important but not conclusive in fixing a future rate or a past just charge. A common carrier cannot be required to serve at a loss, but when the point of remunerativeness is reached there follows a zone of reasonableness in which the value of the service to the patron, the volume and regularity of the traffic, the history of the charge and the extent to which it has been relied on by the public in making investments and establishing businesses, and other elements, may all have an important bearing.

Common carriage both at common law and under legislative rates is a business rather than a succession of individual contracts. There ought to be customary and established charges for similar transportation looking to average costs and profits in the differentiated classes of traffic rather than in particular transactions. For instance the fact that the carrier had misfortunes or the reverse on some particular trip ought not to affect the charges for that trip. The chances of such accidents are to be absorbed in the customary or the prescribed charges. Even as between classes of service that might logically be differentiated, sometimes considerations of policy prevent it. In the present case it appears that trainload shipments of logs can be handled more cheaply than single carloads. But the Florida Commission refused to permit the Cummer scale to be filed as a trainload rate. The Interstate

Commerce Commission did not establish any trainload rates on logs either in interstate commerce or in prescribing an intrastate rate in 1932, although it was well aware of the difference in the cost of handling, but it fixed rates only for carloads. It is uniformly considered to be impolitic to afford a special rate to patrons of railroads who can ship in trainloads to the disadvantage of those who can ship only in carloads. During the restitution period here involved neither shippers nor carriers had any reason to suppose that trainload shippers would be given a rate different from proper carload rates. The master rightly concluded that a reasonable charge for carload shipments ought to be applied to all, but to be fixed in view of the fact that much of the traffic did move in trainloads at a reduced cost and was great in volume and regular in recurrence.

While in fixing a reasonable charge for past transactions the same considerations are in general present as when a future rate is to be prescribed, there is a difference. In fixing a future rate, the effect of the rate on future traffic may be looked to, shippers and carriers being in a measure able to adjust their operations to the rate and the shippers may govern their prices and the extent of their shipments accordingly. When, as in this case, there has been a conflict between a state prescribed and a federal prescribed rate, the shippers relying on the former and the carrier on the latter, and both rates have turned out to be invalid, it is too late for either to do the things that might otherwise have been done. The court in fixing a fair charge has no occasion to consider the future, but taking all the past circumstances into consideration is to determine what is just and reasonable. There was in fact no interstate commerce in logs, so that

discrimination against interstate commerce as to persons and places need not be regarded. Discrimination as respects the revenues of the carrier, while a most important question in fixing permanent future rates, can hardly be investigated or considered in a private litigation between carrier and shipper regarding a past shipment. On the other hand, the fact that the state rate relied on by the shippers during all this period was one originally named by the carrier and voluntarily maintained by it for many years while the shippers were making their investments and establishing their businesses upon the faith of it is deserving of great weight in considering the fairness as between carrier and shipper of suddenly demanding more than double that rate.

It will be remembered that the order of the Interstate Commerce Commission which authorized the increase was resisted successfully and was annulled. The master's report shows that he gave attention to all the important elements proper to be considered, and while it is not so specific as it might be in its subordinate conclusions of fact nor as to how he arrived at the precise scale of reasonable charges which he fixed, yet his conclusion does not appear to be baseless or arbitary, but reasonable and fair.

FINDINGS OF FACT

The testimony as to the cost of hauling the logs satisfies us that the master's finding of a reasonable charge affords compensation to the carrier. It may be that trainloads might have been carried profitably at a less rate, but the traffic as a whole could not be carried for much less. Whether compensation should not be more liberal gives us the most concern.

In view of the experience of the Interstate Commerce Commission and its full and repeated consideration of these very rates, we should have inclined to think the rates which they fixed, first for interstate traffic and then for intrastate traffic on logs, ought to be accepted as the fair charge. Against this, however, is the thought that they were not dealing with past transactions but attempting to fix a future rate to which carriers and shippers ought to conform themselves, and the fact is strong that the low rates were voluntarily established and maintained over a long period by the carrier, and on the faith of them these claimants had made investments and established businesses which would be and were very disastrously affected by a sudden and drastic raising of rates. While the carrier was not bound to continue the low rates at a loss, and could demand compensatory rates, a just and reasonable regard to the entire situation makes against a sudden increase of more than one hundred per cent. on a traffic in which freight costs are a large part of the value of the product shipped. If the ideal rate be those fixed by the Commission, the ideal might with reason and justice have been approached less precipitately. The just compensation as fixed by the master, applicable of course only to these past transactions, affords reimbursement for all fair elements of cost and a fair profit. His figure approximates the intrastate rates on logs in Georgia and North Carolina, and is some lower than that in Alabama and South Carolina. We think the master's conclusion is just and we affirm it.

We therefore overrule all exceptions of all parties to the report, and direct that a decree be prepared upon the basis of the conclusions of law and findings of fact under the original and supplemental reports.

January 22nd, 1934.

SAM'L H. SIBLEY,
Circuit Judge,

WM. H. BARRETT,
U. S. District Judge.

I respectfully dissent.

E. MARVIN UNDERWOOD.

Filed in Clerk's office
at 10:05 A. M., Jan. 26, 1934.

JON DEAN STEWARD, *Clerk.*

APPENDIX NO. 2

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

..... *Complainant*	
vs.	No.....
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL. *Defendants*	In Equity

ANSWER OF ATLANTIC COAST LINE RAILROAD COMPANY TO CLAIM OF.....

Now comes the Atlantic Coast Line Railroad Company and answers the claim of.....

.....

and for answer says:

1.

The amount of claimant's claim to the extent of.....

..... dollars represents the difference between the aggregate of the sums collected by this respondent from claimant for the transportation of logs over its lines in Florida at the times mentioned in said claim, and the aggregate of the sums which would have been collected by it for such transportation if the scale of rates known in the record of this cause as the "Cummer" scale of rates had been applied.

2.

Atlantic Coast Line Railroad Company respectfully avers that it is not indebted to said claimant in said amount, or any other sum, on account of the matters and things therein set out, for the following reasons:

(1) Said claim is not measured by the difference between the amount collected by the Atlantic Coast Line Railroad Company from the claimant and the established lawful rate in force at the time each of the shipments which make the basis of said claim, was made.

(2) The said claim is based upon the amount paid by the claimant to the Atlantic Coast Line Railroad Company on said shipments, less the amount which would have been paid had the scale of rates known as the Cummer scale of rates been in force, which method of calculation is erroneous.

(3) The said Cummer scale of rates was not in force or effect when any of the said shipments moved for the following reasons:

(a) The Interstate Commerce Commission issued and promulgated its order dated August 2, 1928, fixing a scale of rates to be charged for the movement of these logs other and different from those rates known as the Cummer scale of rates.

Litigation ensued in the United States District Court for the Northern District of Georgia in three cases, in one of which the State of Florida and its Railroad Commissioners were the complainants; in another of which Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company were the complainants; and in the other of which the Wilson Lumber Company of Florida was the complainant. The defendants in each of those cases were the United States of America and the Interstate Commerce Commission. Complainants sought to set aside the said order of the Interstate Commerce Commission.

On January 17, 1929, said Court, after hearing, issued its order and decree dismissing said bills. The opinion of said Court construed the order of the Interstate Commission to be limited to intrastate shipments originating in the State of Florida north of and including Jacksonville, Gainesville, Burnett's Lake and High Springs.

Thereafter, and on January 30, 1929, the Florida Railroad Commissioners promulgated their order No. 979, effective on that date. The said order declared:

> "The purpose of this order is to amend the Florida intrastate rates to conform to the orders of the Interstate Commerce Commission in Docket 18364, as construed and defined by the District Court of the United States for the Northern District of Georgia, Atlanta Division, in equity, in its opinion dated January 17, 1929."

(b) The United States Circuit Court of Appeals for the Fifth Circuit, on February 14, 1920, entered its order in the case of *Atlantic Coast Line Railroad Company, Appellant, v. A. S. Wells, F. S. Matthews, Mamie C. Eaton, et al, Appellees*, restraining the enforcement of the said scale of rates known as the Cummer scale, part of which order is as follows:

> "It is ordered by the Court that, for the reasons set out in the aforementioned motion of the Atlantic Coast Line Railroad Company the said A. S. Wells, F. S. Matthews, and Mamie C. Eaton, and their agents, representatives and attorneys, be and they are hereby, restrained until the further order of this court, from enforcing, or undertaking to enforce, the said order of the Railroad Commissioners of the State of Florida, or the order entered in the Circuit Court of Duval County, Florida, in the cause filed therein by the State of Florida, acting through A. S. Wells, F. S. Matthews and Mamie C. Eaton, as Railroad Commissioners of the State of Florida, by F. F. Dunbull, Special Counsel, joined therein by Fred H. Davis, Attorney General."

The said appeal was taken from the United States District Court for the Southern District of Florida in a case in equity brought by the Atlantic Coast Line Railroad Company against the said appellees to restrain and enjoin them from enforcing the rates known as the Cummer scale of rates promulgated in the said order of said Florida Commission, No. 974, with certain territory in the State of Florida excepted from the application of said rates; and also to enjoin them from enforcing the judgment or decree of the Circuit Court of Duval County, Florida, which undertook to enjoin the Atlantic Coast Line Railroad Company from charging any rates on the transportation of the logs involved, other than the said Cummer scale of rates in Florida intrastate transporta-

tion, except over the excepted routes above referred to. Said exceptions did not affect any shipments involved in this claim. The said restraining order of the Circuit Court of Appeals restrained the enforcement of both the Florida Commission's order No. 979 and the said judgment or decree of the Circuit Court of Duval County, Florida.

The said restraining order of the United States Circuit Court of Appeals for the Fifth Circuit remained in force and effect from its date, February 14, 1929, until the same was vacated by the said Court by its order entered on March 30, 1931.

During all of said times the Cummer scale of rates was not in effect, because of said restraining order, and, as well, because of the other facts herein, and in the responses of the Atlantic Coast Line heretofore filed herein as amended. During said times the said Cummer scale of rates was not the scale of rates in lawful effect.

(c) On April 20, 1929, the Florida Commissioners entered their order No. 990 dealing with the intrastate rates on logs known as the Cummer scale of rates. Part of the order then entered is as follows:

> "So much of said Order No. 979 entered by the Railroad Commissioners of the State of Florida January 30, 1929, as relates to intrastate rates between points on the lines of the Atlantic Coast Line Railroad Company in Florida for the transportation of logs except walnut, cherry and cedar and except ash, gum, hickory, oak and cypress logs not over six feet in length, be and the same is hereby suspended so long as the said decree of the said United States District Court for the Northern District of Georgia shall remain in force and effect and unmodified and unreversed."

Said order also contains the following:

> "That so long as the said decree of said United States District Court for the Northern District of Georgia shall remain in force and effect and unmodified and unreversed *the distance scale of commodity rates in force and effect under the authority of the Railroad Commissioners of the State of Florida on and prior to February 7, 1929, for the transportation of logs, except walnut, cherry and cedar, between points on the Atlantic Coast Line Railroad in Florida, be and they are hereby suspended:* but nothing in this Order shall affect any rate for the transportation intrastate, between points on the Atlantic Coast Line Railroad in Florida, of ash, gum, hickory, oak, pine and cypress logs not over six feet in length under any scale of rates in force and effect under the authority of the Railroad Commissioners of the State of Florida on or prior to February 7, 1929."

The decree of the United States District Court for the Northern District of Georgia, referred to in the above quotation is the one dated April 17, 1929.

Respondent avers that the said Cummer scale of rates was suspended by virtue of said order No. 990 and remained so suspended from the date of its issuance, April 20, 1929, until its revocation by the Florida Commissioners on the 5th day of March, 1931. It did not provide the lawful scale of rates during any of said time.

The said Cummer scale of rates was also not in effect during any of this said period because of the restraining order issued by the Circuit Court of Appeals on the 14th day of February, 1929, and above referred to. Nor was the scale of rates the lawful scale for the purposes of this cause at any of the times herein involved for the reasons herein set out.

Nothing now involved in this claim concerns logs not over six feet in length referred to in the above mentioned quotation.

Order No. 990 also provided that:

> "This order shall remain in force and effect until the further order of the Railroad Commissioners of the State of Florida."

There was no further order of the Railroad Commissioners of the State of Florida on the subject until March 5, 1931.

3.

The Cummer scale of rates, upon which this claim is based, was at all the times herein involved, unjust and unreasonable for all of the reasons set out in the Atlantic Coast Line Railroad Company's response and amended response heretofore filed in this cause.

4.

Said Cummer scale of rates was, at all times herein involved, so low, unjust and unreasonable, that to use it as a measure of respondent's reward for the transportation service rendered will have the effect of requiring respondent to render transportation service at rates which are confiscatory, which provide for it no return, or if any return, a wholly inadequate one on the value of its property so used, all of which will be contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, upon which this respondent relies.

To have enforced the said rates during the period involved would have exceeded the power of the Railroad Commissioners of Florida whose statutory power was, and is, limited to making and enforcing reasonable and just rates.

5.

To exact restitution of the Atlantic Coast Line Railroad Company on the basis of the Cummer scale of rates will be as though the Atlantic Coast Line Railroad Company had been required to render service on charges which were unjust and unreasonable; and to direct it to make restitution on that basis will be to require it to do an unjust and unreasonable thing. This would be inequitable. The claimant seeks equity of the Atlantic Coast Line, and it cannot have equity against it by requiring it to do an unjust and inequitable thing.

6.

Respondent further says that the Interstate Commerce Commission, on the motion of Georgia Public Service Commission and of Atlantic Coast Line Railroad Company heretofore, reopened its proceedings in its Docket No. 18364, that being the proceeding in which the original order of the Interstate Commerce Commission dated August 2, 1928, was entered, and which became the subject matter of the litigations hereinbefore referred to.

There were hearings in this reopened proceeding and substantial additional evidence was taken. The Examiners considering said cause have made a tentative report for the Commission, part of which is as follows:

"Finding in 146 I. C. C. 717 that rates on logs, except walnut, cherry, and cedar, in carloads, from points in north Florida to destinations in Georgia were unreasonable, affirmed. Present rates found not unreasonable."

The "present rates" referred to are the interstate rates fixed by the Interstate Commerce Commission in its proceeding above mentioned.

Said tentative report also finds that the rates on said logs (over six feet in length) in carloads, applying on shipments between points on the Atlantic Coast Line Railroad Company in Florida are "unjustly discriminatory against interstate commerce."

The rates thus found to have been unreasonable and also unjustly discriminatory against interstate commerce are those which are referred to in this case as "the Cummer scale of rates," and which claimant seeks in this proceeding to make the standard of its right of recovery against this respondent.

Respondent says that no action should be had in this proceeding until the Interstate Commerce Commission has taken final action upon the above mentioned tentative report.

Respondent further says that no action should be taken against it in this proceeding until the Interstate Commerce Commission shall have determined whether or not there should be restitution by this respondent; and until said Commission shall have fixed the standard to be applied in determining the extent of the said restitution in the event there shall have been a finding that this respondent should make restitution.

7.

In addition, and for a'l of the causes set out in the response and amended response of the Atlantic Coast Line Railroad Company, heretofore filed in this cause, the said Cummer scale of rates is not the proper basis for restitution in this cause and should not be used as such basis.

Wherefore, respondent prays that it be determined by this Court that the claim of said claimant be denied.

Respectfully submitted,

F. B. GRIER,

CARL H. DAVIS,

W. E. KAY,

ALSTON, ALSTON, FOSTER & MOISE,

Attorneys for Atlantic Coast Line Railroad Company

GEORGIA
FULTON COUNTY.

Before me the undersigned officer, duly authorized to administer oaths, personally appeared J. W. Perrin who, being by me duly sworn, deposeth and saith on oath that he is Freight Traffic Manager of the Atlantic Coast Line Railroad Company and that the statements contained in the foregoing answer are true except when stated on information and belief or in matters of opinion, and then he verily believes them to be true.

(Signed) J. W. PERRIN.

Subscribed and sworn to before me
this 28th day of January, 1932.

MARGERY DAVENPORT,
Notary Public, State of Georgia at Large.